# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~499.~~ 2485-2

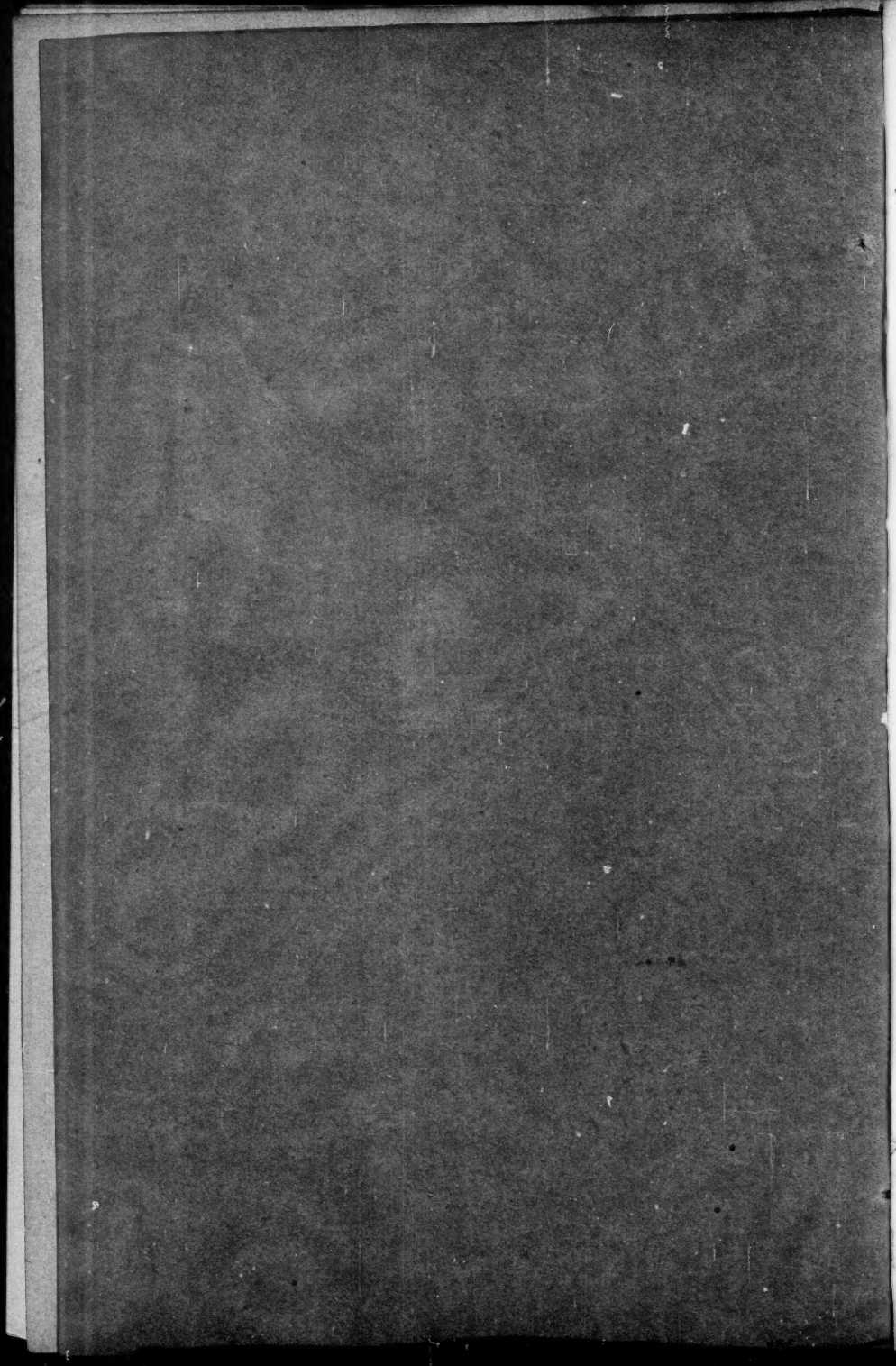
THE WEST WISCONSIN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF TREMPEALEAU.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

**FILED SEPTEMBER 14, 1874.**



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of Wisconsin, greeting:

Because in the records and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of Wisconsin before you, being the highest court of law or equity of said State in which a decision could be had in the said suit, between the West Wisconsin Railway Company, appellant, and the board of supervisors of the county of Trempealeau, respondent, wherein was drawn in question the validity of a statute of said State and of an authority exercised under the same, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such, their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and of statutes thereof, and the decision was against the title, right, privilege, or exemption specially set up and claimed under such clause of said Constitution and statutes, a manifest error hath happened, to the great damage of the said West Wisconsin Railway Company, as by its complaint appears; and, it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the Supreme Court, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to law and custom of the United States, should be done.

Witness the honorable Harrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 14th day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence the United States the ninety-ninth.

[SEAL.] F. M. STEWART,
*Clerk of the District Court of the United States for the Western District of Wisconsin.*

August 14th, 1874.
Allowed by me—

E. G. RYAN,
*Chief-Justice Supreme Court of the State of Wisconsin.*

2 STATE OF WISCONSIN,
*Supreme Court, ss:*

The return to the within writ appears by the schedule hereto annexed. The return of the justices of the supreme court of the State of Wisconsin.

Attest:

LA FAYETTE KELLOGG, *Clerk.*

3 UNITED STATES OF AMERICA:

To the Board of Supervisors of the county of Trempealeau:

Whereas the West Wisconsin Railway Company, plaintiff, lately issued out of the Supreme Court of the United States a writ of error

directed to the supreme court of the State of Wisconsin, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judges thereof, between said plaintiff and you, a manifest error hath happened to the great damage of the said plaintiff, the West Wisconsin Railway Company:

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the Supreme Court of the United States, at the city of Washington, on the second Monday of October next:

You are, therefore, hereby cited to appear before the said Supreme Court at the city of Washington, on the said second Monday of
4 October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Madison, the fourteenth day of August, in the year of our Lord one thousand eight hundred and seventy-four.

E. G. RYAN,
*Chief-Justice Supreme Court of Wisconsin.*

I, A. W. Newman, attorney for the board of supervisors of the county of Trempealeau, in the suit referred to in the foregoing citation, hereby admit service of the said citation on this 18th day of August, A. D. 1874.

A. W. NEWMAN.

(Indorsed:) West Wis. R. R. Co. vs. Suprs. Trempe'leau Co. Citation. Filed Aug. 31, 1874. L. F. Kellogg, clk. &c.

5 Supreme Court of the United States.

THE WEST WISCONSIN RAILWAY COMPANY
*vs.*
THE BOARD OF SUPERVISORS OF THE COUNTY of Trempealeau.

Know all men by these presents, that we, the West Wisconsin Railway Company, and John Comstock and Abram H. Baldwin, both of Hudson, Saint Croix County, Wisconsin, are firmly held and bound unto the board of supervisors of the county of Trempealeau in the sum of five hundred dollars, to be paid to the said board of supervisors of the county of Trempealeau, its successors or assigns, to which payment, well and truly to be made, the said West Wisconsin Railway Company binds itself by these presents, which it has caused to be signed by Abram H. Baldwin, its vice-president, and we, the said John Comstock and Abram H. Baldwin, bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals this twenty-fourth day of August, A. D. 1874.

Whereas the above-named West Wisconsin Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Wisconsin:

6 Now, therefore, the condition of this obligation is such that if the above-named West Wisconsin Railway Company shall prosecute their said writ of error to effect, and answer all costs if they shall

fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

{ WEST WISCONSIN RAILWAY CO. SEAL. } THE WEST WISCONSIN RAILWAY CO.
By A. H. BALDWIN, *Vice-President.*
JOHN COMSTOCK. [SEAL.]
ABRAM H. BALDWIN. [SEAL.]

Attest:
H. H. WEAKLEY,
*Sec'y W. W. Ry. Co.*

Sealed and delivered in presence of—
JOHN C. SPOONER.
H. C. BAKER.

STATE OF WISCONSIN,
*Saint Croix County, ss:*

John Comstock and Abram H. Baldwin, both of said county, each being duly sworn, says for himself that he is worth the sum of one thousand dollars over and above all debts by him owing, and all exemptions by law, in property situate in said county, liable to execution, and further saith not.

{ WEST WISCONSIN RAILWAY CO. SEAL. } JOHN COMSTOCK.
ABRAM H. BALDWIN.

7 Subscribed and sworn to before me this 24th day of August, A. D. 1874.

{ JA. A. ANDREWS, NOTARY PUBLIC, ST. CROIX COUNTY, WIS. } JA. A. ANDREWS,
*Notary Public, Saint Croix County, Wisconsin.*

I approve of the above bond and of the sureties thereto as sufficient. Dated August 31st, 1874.

E. G. RYAN,
*Chief-Justice Supreme Court of Wisconsin.*

8 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in the city of Madison, the seat of government of said State, on the first Tuesday of June, A. D. one thousand eight hundred and seventy-four.

Present, the Hon. Luther S. Dixon, chief-justice, the Hon. Orsamus Cole, and the Hon. William P. Lyon, associate justices of said court, La Fayette Kellogg, clerk.

Be it remembered that heretofore, to wit, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and seventy-four, came into the office of the clerk of said supreme court the West Wisconsin Railway Company, by John C. Spooner, esq., its attorney, and filed its certain notice of appeal from the judgment of the circuit court of the county of Trempealeau in said State, and also the return of the clerk of said circuit court to such appeal, which said notice of appeal and return thereto are in the words and figures following, that is to say:

9 *Notice of appeal.*

STATE OF WISCONSIN:

Circuit court, Trempealeau County.

WEST WISCONSIN RAILWAY COMPANY, plaintiff,
*against*
THE BOARD OF SUPERVISORS OF TREMPEALEAU County, defendant.

SIR: Take notice that the plaintiff above named hereby appeals to the Supreme Court from the judgment rendered herein on the 17th day of January, 1874, in favor of the defendant and against the plaintiff, and from the whole thereof.

WEST WISCONSIN RAILWAY CO.
By JOHN C. SPOONER, *Plff.'s Atty.*

TO CHARLES E. PERKINS,
*Clerk Circuit Court, Galeville, Trempealeau Co., Wis.*

10 *Summons.*

Circuit court, Trempealeau County, the State of Wisconsin.

WEST WISCONSIN RAILWAY COMPANY, plaintiff,
*against*
THE BOARD OF SUPERVISORS OF THE county of Trempealeau, defendant.

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, in the city of Hudson, in the county of Saint Croix, and State of Wisconsin, within twenty days after the service hereof, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated December, 1872.

JOHN C. SPOONER,
*Plaintiff's Attorney.*

11 *Complaint.*

STATE OF WISCONSIN:

In circuit court for Trempealeau County.

WEST WISCONSIN RAILWAY COMPANY, plaintiff,
*against*
THE BOARD OF SUPERVISORS OF THE COUNTY of Trempealeau, defendant.

The plaintiff complains of the defendant and says:

1. That the portion of the grant of lands made by the Congress of the United States by act approved June 3, A. D. 1856, to the State of Wis-

consin to aid in the construction of certain railroads in said State, applicable to that portion of the road lying between the town of Tomah, Monroe County, and the Lake Saint Croix, was conferred by chapter 243 of the private and local laws of the State of Wisconsin for the year 1863, upon the Tomah and Lake Saint Croix Railroad Company, by the said chapter incorporated, to aid said company in constructing said road; that within six months after the passage of said act the said Tomah and Lake Saint Croix Railroad Company filed with the secretary of State, at Madison, a resolution duly adopted by its board of directors, accepting said act of incorporation and the grant of said lands therein contained; that said grant was afterwards by an act of the said
12 legislature, to wit, chapter 232 of the general laws of 1860, confirmed to said company; that by said act of incorporation and the acts amendatory thereof, to wit, chapter 324, general laws 1864, & 323 pr. & l. laws of 1866, the said company was authorized, in order to raise money with which to construct said road, to borrow money, execute notes and issue bonds, such bonds to run for such time as the company should determine, and to secure the payment of said bonds and the interest thereon the said company was authorized to execute a mortgage or deed of trust upon and of all its property, real, personal, and mixed, in possession and in expectancy; that by chapter 285 of the private and local laws of 1866, the said company was authorized by resolution of its board of directors to change its corporate name to West Wisconsin Railway Company, which change was duly made; that afterwards, to wit, in the year 1868, the said West Wisconsin Railway Company did, in the exercise of the authority given by said acts of the legislature, issue what were known as its land-grant bonds to the amount of four million dollars, said bonds being payable fifteen years from the date thereof, and bearing interest at ten per cent. per annum in gold, payable semi-annually; the payment of which bonds and the interest thereon was secured by a deed of trust executed on the 28th day of August, 1868, by the terms of which the road-bed, the rolling-stock, and all lands thereafter to be acquired from the State of Wisconsin or the
13 United States were deeded to trustees, with the provision, among others, that the lands should be released from time to time, as in said deed of trust provided, for sale by said company, and that the avails of said lands when sold should be paid direct to said trustees, to be applied to the payment of said bonds; that at the time said bonds were issued and said deed of trust executed no portion of said road had been constructed, nor had any portion of the lands so granted been acquired by said company; that said bonds were negotiated in order to raise the money with which to construct said railroad; that the money realized from the sale of said bonds, to wit, the sum of three million two hundred thousand dollars was applied by said company to the construction and equipment of said road, and was not adequate for the purpose; that none of said bonds mature before 1883, and by far the greater portion of them do not mature before 1885 and 1886; that said company completed said road about the month of November, 1871, and acquired title to the lands so granted by the United States and said State; that as soon as practicable after acquiring title thereto, said lands were placed in market for sale, but a very small quantity has been sold or contracted to be sold, and no portion thereof leased or improved; that the said railway company is selling said lands as rapidly as possible, and proposes to continue so to do; that the avails of the lands heretofore sold have been applied to the payment of said bonds, and that all of said bonds remain unpaid save and except the amount of one hundred

thousand dollars; that the lands hereinafter described, and all the lands of said company in said county, are covered by and included in said deed of trust, and that the said lands hereinafter described have not been sold, contracted to be sold, leased, or improved; that it is uncertain what will be the avails of said lands so included in said deed of trust, but that the strong probability is that such avails will be totally inadequate to the payment of said bonds and the interest thereon.

Wherefore the plaintiff insists that, by reason of the premises, all the said lands covered by an' included in said deed of trust, and not heretofore sold, contracted to be sold, leased, or improved, have been, ever since the execution of such deed, and still are, exempt from all taxation, and will remain so exempt until said bonds shall mature, so that the avails of said land may be applied to the repayment of the money so raised and used in the construction and equipment of said road.

2. That the northeast quarter of the southeast quarter, and the northwest quarter of the southwest quarter of section one, and the northeast quarter of the northeast quarter, and northeast quarter of the northwest quarter of section three, and the northeast quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section five, all in township twenty-three north of range eight west, situate in said county of Trempealeau, is a part of the land so granted by the Congress of the United States to the State of Wisconsin, under the act of Congress approved June 3d, A. D. 1856, the title in fee whereof became vested in said railway company (the plaintiff) in the year 1870, in pursuance of chapter 243 of the private and local laws of the State of Wisconsin for the year 1863, and that said company has never sold, leased, or conveyed, or contracted to sell, lease, or convey, the said tracts of land, or any part thereof, nor has the same ever been improved.

3. That the plaintiff, upon the proposition or offer contained in chapter 104 of the general laws of the State of Wisconsin for the year 1870, to the effect that the lands hereinbefore referred to, except those lying in the county of Pierce, should be exempt from all taxation for the further term of ten years therein mentioned, upon the condition that said railway company should build their said road within two years from the 16th day of March, 1870, proceeded to place in market the lands of said company to raise money for the completion of said road, which said bonds were secured by mortgage on said lands, and which said bonds were sold in Europe to the amount of several millions of dollars, mainly by reason of the fact that said lands would, by virtue of said proposition, be exempt from taxation in case said road was built within the time mentioned, and with the money so raised proceeded, in the year 1870, to construct 45 miles of said road, and did build and complete the whole road prior to the said 16th day of March, 1872, which was sooner than the said company was required, by act of Congress or any act of the legislature of Wisconsin, to complete said road, by means whereof the tracts of land described in the 1st paragraph of this complaint, as well as all the other lands above referred to which the plaintiff acquired from the State, and has not sold, leased, or conveyed, or contracted to sell, lease, or convey, were, in the year 1870, and ever since have been, by law exempt from all taxation.

4. That, in the year 1871, the tracts of land described in said 1st paragraph were assessed for taxes in said county of Trempealeau for State, county, and other taxes in the same manner as though they had not been exempt, and on the 14th day of May, A. D. 1872, were sold by the treasurer of said county for the non-payment of the taxes so assessed,

and tax-certificates for the same issued in the ordinary form to the said the county of Trempealeau, who bid off the same at said sale, and who is still the holder of said certificates.

5. That the plaintiff desires to have the lands referred to in the 1st paragraph hereof, including the parcels therein specially described, sold at private sale, in pursuance of the mortgage hereinbefore mentioned, for the purpose of paying the bonds secured thereby; and the said tax-certificates are a cloud upon the title to the said tracts of land, which prevents the sale thereof.

Wherefore the plaintiff demands judgment that the said cer-
17 tificates, and the sales therein mentioned, be declared void, and that said certificates be delivered up to be canceled, and for such other and further relief as may be just, together with the costs of this action.

JOHN C. SPOONER,
*Plaintiff's Attorney.*

*Answer.*

Circuit court, Trempealeau County.

WEST WISCONSIN RAILWAY COMPANY, PLAINTIFF,
*vs.*
THE BOARD OF SUPERVISORS OF TREMPEALEAU County, defendant.

The defendant answers to the complaint herein:

That no allegation thereof is true; that chapter 356 of the private and local laws of 1871, published March 22d, 1871, provides that from and after the passage and publication of said act, all land in Trempealeau County owned by any railroad company not used for road-bed or depot purposes, shall be liable to taxation the same as other real estate within said county; and that the lands described in the complaint have never been used by the plaintiff for road-bed or depot purposes.

A. W. NEWMAN,
*Defendant's Attorney.*

18 At a general term of the circuit court of Trempealeau County, began and held at the court-house in the village of Galesville on the second Tuesday of October, A. D. 1873, the same being the 14th day of October, A. D. 1873.

Present, The honorable Romanzo Bunn, judge.

THE WEST WISCONSIN RAILWAY COMPANY, plaintiff,
*vs.*
THE BOARD OF SUPERVISORS OF THE COUNTY of Trempealeau, defendant.

This action was brought to trial before the court without a jury at the said term, and thereupon the court finds the following facts:

First. That on or about the third day of June, 1856, there was enacted and approved an act of Congress entitled "An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State," whereby Congress granted to the State of Wisconsin for the

purpose of aiding in the construction of a railroad from Madison
19 or Columbus, by way of Portage City, to the St. Croix River or Lake, between townships 25 and 31, and from thence to the west end of Lake Superior, and to Bayfield, every alternate section of land designated by odd numbers for six sections in width on each side of said road, of which the lands and premises mentioned in the complaint are a part.

Second. That the legislature of the State of Wisconsin, in the year 1856, duly enacted an act entitled "An act to accept the grant and execute the trust conferred upon the State of Wisconsin by an act of Congress entitled 'An act granting public lands in the State of Wisconsin to aid in the construction of railroads in said state,'" which said act was approved June 3d, 1856, being chapter 118 of the general acts passed by the legislature of Wisconsin in the year 1856, (and is hereto annexed, marked "Exhibit No. 1.")

Third. That in the year 1863 the legislature of the State of Wisconsin passed an act entitled "An act to incorporate the Tomah and Lake St. Croix Railroad Company, and to repeal and annul a portion of a grant of land heretofore made to the La Crosse and Milwaukee Railroad Company," which said act was duly approved April 2d, 1863, being chapter 243 of the private and local acts passed by the legislature of Wisconsin in the year 1863, a copy of which act is hereto annexed, marked "A," and made a part of this finding; that the plaintiff
20 was duly organized and incorporated under said last-mentioned act.

Fourth. That subsequently and on the 6th day of October, 1863, at a meeting of the directors of the Tomah and St. Croix Railroad Company held at Eau Claire, in the county of Eau Claire, in the State of Wisconsin, the following resolution was passed: "Resolved that the act to incorporate Tomah and Lake St. Croix Railroad Company, approved April 1st, 1863, and the grant therein contained, and in pursuance of said act, the same is hereby accepted by the directors of the Tomah and St. Croix Railroad Company; and it is further resolved that a copy of this resolution be certified by the secretary of said company and be deposited in the office of the secretary of state, in Madison, in pursuance of said act," which said resolution was duly certified by the secretary of said company, and was duly filed in the office of the secretary of state on the 3d day of November, 1863.

Fifth. That in the year 1864, the legislature of the State of Wisconsin passed an act entitled "An act to aid the Tomah and Lake St. Croix Railroad Company," which said act was duly approved April 2d, 1864, being chapter 324 of the general acts passed by the legislature of Wisconsin in the year 1864, (and is hereto annexed, marked "Exhibit No. 2.")

21 Sixth. That in the year 1864, Congress passed an act approved May 5th of that year, by which Congress made an additional grant of four sections to the mile, for the same purpose and on the same conditions as in the act of June 3d, 1856, and extended the time for the construction of the road to May 5th, 1869.

Seventh. That in the year 1865, the legislature of the State of Wisconsin passed an act entitled "An act to confer upon the Tomah and Lake St. Croix Railroad Company all the rights and privileges granted and conferred to the State of Wisconsin by the acts of Congress approved June 3d, 1866, and May 5th, 1864," which said act was duly approved March 29th, 1865, being chapter 232 of the general laws of 1865, (and is hereto annexed, marked "Exhibit No. 3.")

Eighth. That the legislature of the State of Wisconsin, in the year 1866, passed an act entitled "An act to amend section 14, chapter 243, of the session laws of 1863," entitled "An act to incorporate the Tomah and Lake Saint Scroix Railroad Company," approved April 1st, 1863; said act was duly approved April 6th, 1866, being chapter 323 of the private & local laws of 1866, which act provided as follows: "Section 14, chapter 243, of the session laws of 1863, is hereby amended by striking out all after the word 'completed' in line thirty-nine," (and is hereto annexed, marked "Exhibit No. 4.")

Ninth. That in the same year the legislature of said State
22 passed an act entitled "An act to extend the time exempting certain lands from taxation," which said act was duly approved April 9th, 1866, being chapter 73 of the general laws of 1866, (which is hereto annexed, marked "Exhibit No. 5.")

Tenth. That in the same year the said legislature passed an act entitled "An act to legalize and reorganize the Tomah and Lake St. Croix Railroad Company," with leave granted to change the name of said company, which said act was duly approved April 5th, 1866, being chapter 285 of the private and local laws of that year, (which is hereto annexed, marked "Exhibit No. 6.")

Eleventh. That on the 4th day of June, 1867, at a meeting of the board of directors of the plaintiff, a resolution was duly passed changing the corporate name of the plaintiff from The Tomah and Lake St. Croix Railroad Company to The West Wisconsin Railway Company; which said resolution was duly filed in the office of the secretary of state.

Twelfth. That on the 28th day of August, 1868, the plaintiff executed a deed in the nature of a mortgage, by the terms of which the road-bed, rolling-stock, and all lands thereafter to be acquired from the State of Wisconsin or the United States, were, as security for the payment of certain bonds to be issued by the plaintiff, deeded to trustees, with the provision, among other things, that the lands should be released
23 from time to time for sale by said company, and that the avails of said lands when sold should be paid direct to such trustees, to be applied to the payment of said bonds, the payment of which was so secured by said deed of trust. That the amount of bonds secured by said deed of trust was four million dollars; that said bonds were known as the plaintiff's land-grant bonds; that none of said bonds mature before the year 1883, and by far the greater portion of them do not mature before 1885 and 1886; that said bonds were executed before any portion of said road was constructed, and before the plaintiff acquired title to any of the lands granted to aid in constructing said road; that the sum of three million two hundred thousand dollars or thereabouts was realized from negotiations of said bonds; that the entire sum was expended in the construction and equipment of said road, and was inadequate for the purpose; that said bonds run fifteen years from the date thereof, bearing interest at ten per cent. per annum in gold, payable semi-annually; that they were issued in series; the first series being issued in 1868 and the remaining in 1870, 1871, & 1872.

Thirteenth. That in the year 1868, Congress, by joint resolution, extended the time for the completion of said road for three years, to wit, to May 5th, 1872.

Fourteenth. That in the year 1870, the legislature of the State
24 of Wisconsin passed an act entitled "An act to aid the West Wisconsin Railway Company," approved March 16th, 1870, being chapter 104 of the general laws of that year, (and is hereto annexed, marked "Exhibit No. 7.")

Fifteenth. That immediately after the passage of said last-mentioned act the fact of its existence was published to the public extensively in the United States and abroad as an inducement to the sale of said bonds; that the existence of said act was also largely published by said plaintiff during the year 1871, throughout the United States and abroad; that during the year 1870, after the passage of said act and after the publication of its existence, the said company sold about $800,000 of said bonds, principally in Europe.

Sixteenth. That said road was completed from Tomah to Black River Falls during the fall of the year 1868. That immediately after the said act of 1870, the company proceeded with the construction of said road, and did during the year 1870 construct 45 miles or more of said road. That plaintiff did thereafter continuously proceed with diligence in the construction of said road, pursuant to said last-mentioned act, and did complete the same during the month of November, 1871. That during the year 1870, after the passage of said act, the said plaintiff relying thereon and on the strength thereof, incurred large liabilities and
25 made large expenditures of money in hastening the construction and completion of said road, pursuant to the provisions of said act, and continued so to do until said road was completed, relying upon the provisions of said act.

Seventeenth. That as soon as practicable after the plaintiff acquired title to the land granted by the said act incorporating said company, and the acts supplementary thereto, the lands were put in the market. That said company has sold them since as rapidly as possible; that but a very small portion of said lands have been sold; that plaintiff intends to sell the said lands in the future as rapidly as sales can be effected; that the avails of the lands already sold have been applied to the payment of said bonds, and that said avails were only adequate to the payment of said bonds to the amount of $100,000. That the whole amount of lands called for by the grant of Congress was about one million acres. That said grant was not a full grant; that there is a deficiency in said grant of $294{,}981\frac{88}{100}$ acres, which had been disposed of by the United States, and which said company cannot make up; that a large portion of the land to which said company had so acquired title is sandy, barren, and comparatively worthless; that it is uncertain what amount the avails of said lands will reach; that the strong probability is
26 that they will be insufficient for the payment of said bonds.

Eighteenth. That in the year 1871, the legislature of the State of Wisconsin passed an act entitled "An act in relation to taxes on certain real estate in Trempealeau County," which act was published March 22d, 1871, being chapter 356 of the private and local laws of that year, (and is hereto annexed, marked "Exhibit No. 8.")

Nineteenth. That in the same year the said legislature passed an act entitled "An act to amend section 2, chapter 104, of the general laws of 1870," entitled "An act to aid the West Wisconsin Railway Company," which act was approved March 24th, 1871, being chapter 139 of the general laws of that year, (and is hereto annexed, marked "Exhibit No. 9."

Twentieth. That the lands mentioned in the complaint were, during the years 1871 and 1872, held by plaintiff under patent from the State of Wisconsin; that said lands are a portion of the lands granted by act of Congress approved June 3d, 1856, to the State of Wisconsin, to aid in the construction of said road, and granted to said company in its act of incorporation and the acts supplementary thereto; that said lands have not been sold by the plaintiff nor contracted to be sold or leased, or improved, and that said lands are not used by the plaintiff for roadbed or depot grounds.

27 Twenty-first. That the lands mentioned in the complaint were, during the year 1871, assessed in the county of Trempealeau for State, county, and local taxes, and were on the 15th day of May, 1872, sold for non-payment of said taxes. That at such sale said lands were bid in by the county of Trempealeau. That certificates of such sale were issued, and said certificates are now held by said county.

Twenty-second. That at the time of the commencement of this action a notice of the pendency thereof in due and proper form was duly filed with the register of deeds of said county of Trempealeau.

And as conclusions of law the court finds as follows:

First. That the said lands were liable to taxation and to be sold for the non-payment of taxes thereon at the time when they were so assessed for taxation and sold for non-payment of taxes thereon as aforesaid.

Second. That plaintiff is not entitled to the relief demanded in the complaint, and that the complaint must therefore be dismissed upon the merits of the action.

By the court.

R. BUNN, *Judge.*

28 *Exception.*

STATE OF WISCONSIN:

Circuit court of Trempealeau County.

WEST WISCONSIN RAILWAY COMPANY, PLAINTIFF,
*vs.*
THE BOARD OF SUPERVISORS OF TREMPEALEAU County.

The finding by the court of the facts in this action and his conclusions of law thereon having been made and filed, now comes the plaintiff, by John C. Spooner, its attorney, and excepts to said conclusions of law; that is to say:

The plaintiff hereby excepts to the first conclusion of law and to each and every part thereof.

The plaintiff hereby excepts to the second conclusion of law and to each and every part thereof.

Dated January 17th, 1874.

JOHN C. SPOONER,
*Plaintiff's Attorney.*

At a general term of the circuit court for Trempealeau County, begun and held at the court-house in the village of Galesville, on the second Tuesday, the same being the 14th day of October, A. D. 1873.

Present: Hon. Romanzo Bunn, judge.

*Judgment.*

Circuit court, Trempeleau County.

WEST WISCONSIN RAILWAY COMPANY, PLAINTIFF,
*vs.*
THE BOARD OF SUPERVISORS OF TREMPEALEAU Co*mpany*, defendant.

29 This action having been brought to a trial by the court, and

the decision of the court therein having been filed, whereby the court decides in favor of the defendant;

It is now, on motion of A. W. Newman, counsel for the defendant, adjudged that the complaint be dismissed upon the merits of the action, and that the defendant recover twenty-five dollars costs of the action.

Dated January 17th, 1874.

CHARLES E. PERKINS, *Clerk.*

*Waiver of undertaking.*

STATE OF WISCONSIN:

Circuit court for Trempealeau County.

WEST WISCONSIN RAILWAY COMPANY, PLAINTIFF,
*vs.*
THE BOARD OF SUPERVISORS OF TREMPEALEAU County, defendant.

Judgment having been rendered and entered against the plaintiff in the above-entitled action, and notice of appeal to the supreme court having been given by the plaintiff, I hereby waive the giving by the plaintiff of the usual undertaking on appeal, or of any undertaking on appeal.

A. W. NEWMAN,
*Defendant's Attorney.*

30 *Clerk's certificate.*

WEST WISCONSIN RAILWAY COMPANY, PLAINTIFF,
*vs.*
THE BOARD OF SUPERVISORS OF TREMPEALEAU County, defendant.

I, Charles E. Perkins, clerk of the circuit court in and for the county of Trempealeau, State of Wisconsin, do certify that the annexed are the original papers in the above-entitled action, and that they are transmitted to the supreme court pursuant to an appeal taken.

Witness my hand and official seal, at Galesville, in said county, this 19th day of January, 1874.

[L. S.] CHARLES E. PERKINS.
*Clerk of Court.*

31 And afterwards, to wit, at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in the city of Madison, on the second Tuesday, to wit, the thirteenth day of January, A. D. 1874, on the thirty-fifth day of the term, to wit, on the sixteenth day of February, A. D. 1874, the following proceedings were had in said cause inter alia, to wit:

THE WEST WISCONSIN RAILWAY COMPANY, appellant,
*vs.*
THE BOARD OF SUPERVISORS OF THE COUNTY of Trempealeau, respondent.

And now, at this day, come the parties herein, by their attorneys, and

this cause having been fully argued by Messrs. J. C. Spooner, H. S. Orton, and P. L. Spooner, for the said appellant, and by A. W. Newman, esq., for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

32 And afterwards, to wit, at a term of the said supreme court of the State of Wisconsin, begun and held at the capitol, in the city of Madison aforesaid, on the first Tuesday, to wit, the second day of June, A. D. 1874, on the second day of the term, to wit, on the sixteenth day of June, A. D. 1874, the following opinion was filed by the supreme court in said cause, that is to say:

33 Supreme court.

THE WEST WISCONSIN R'Y CO., APPELLANT,
*vs.*
THE BOARD OF SUPERVISORS OF THE COUNTY of Trempealeau, respondent.

The plaintiff company demands the cancellation of the tax-certificates on the ground that the lands in question were not subject to taxation in 1871, when the tax was levied, and because such certificates constitute a cloud upon its title. It is claimed by the defendant that the company has not such an actual, visible possession and occupancy of the lands as entitle it to maintain an action for this equitable relief.

This point becomes immaterial in view of the conclusion we have reached upon the controlling question in the case, viz, the taxability of the lands. In our judgment, the lands were liable to taxation when the tax was assessed upon them, and consequently might be sold for non-payment of taxes.

The claim that these lands were exempt from taxation is founded upon ch. 324, laws 1864, and the amendatory act of 1870, ch. 104. These enactments, it is argued, expressly exempted these lands from taxation for a specified period, unless they were leased, sold, or contracted to be sold within that time by the company, and this exemption from tax-

34 ation, it is insisted, amounts to a contract between the company and the State which is irrevocable in its nature. By the first section of the law of 1864 it is in substance enacted, that all lands thereafter acquired by the plaintiff company and of which the title in fee may become vested in said company, pursuant to the act of Congress, approved June 3d, 1856, and the laws of the State of Wisconsin, granting, etc., shall be exempt from all taxation for ten years from and after the passage of the act. The second section provides, in case any such lands were sold, contracted to be sold, leased, or conveyed by the company, then they should become subject to taxation immediately and the exemption should no longer apply, with the proviso that the lands might be mortgaged for the purpose of raising funds to build the railroad without being subject to taxation for the time aforesaid. By the act of 1870 (ch. 104) the time mentioned in the act of 1864, and the act supplementary thereto in relation to the taxation of the lands granted by Congress to aid in building the road, was further extended ten years as to such lands as should remain unsold by the company, upon condition that the company should complete its road within two years, but the act was not to apply to Pierce County.

These are the enactments by which it is claimed the legislature ex-

pressly released the right to tax the lands of the company so as to place it beyond the power of the State to resume or restore it until the period of exemption had expired. In 1871 the legislature did in fact repeal the exemption, so far as the lands in Trempealeau County were concerned, (ch. 139, laws 1871, also ch. 356, P. & L., 1871,) and it is the validity of these statutes which is called in question or involved in the case.

The validity of these acts repealing the exemption is mainly rested upon the power reserved to the legislature by section one, article eleven, of the constitution, which in terms declares that all general laws or special acts under which corporations without banking powers are created may be altered or repealed by the legislature at any time after their passage. If proper force and effect are given to this constitutional provision, it would seem to afford ample authority for the enactment of the repealing statutes above cited, as it reserves the right to the legislature to annul and revoke all corporate franchises and privileges which it might grant. In this case the legislature first relinquished the right of taxation so far as the lands in controversy are concerned, and then subsequently resumed it. But this, the learned counsel for the company contend, it was not competent for this legislature to do, because it impaired the obligation of a contract which the State had made. The doctrine that a State may grant or bargain away beyond recall the right of taxation, a high political and sovereign power, essential to the very existence of the State, and without which no governmental functions can be exercised or carried on, has always seemed to me to rest upon very unsatisfactory grounds, and I am unable to assent to its general correctness. If the legislature of a State may relinquish for a specified period, the right to tax the property of persons or corporations within its jurisdiction, it may do so permanently, and it may upon the same ground relinquish its police power, the right of eminent domain, and other sovereign powers until nothing of the State government remains but a name. I should greatly regret the general recognition or even acquiescence without protest in such a doctrine as sound constitutional law, and therefore I feel constrained to withhold my assent to it at this time. I do not propose to enter upon any discussion of the question, however, as it is not necessarily the ground upon which our decision in this case is founded. I concede that the Supreme Court of the United States say that the question whether the legislature has power to grant away the right of taxation is one not open for discussion in that court, because this power has been affirmed by repeated adjudications made in that court, and the doctrine of the Dartmouth College case has been applied in all its extent and rigor to such a legislative grant. And when the legislature has made a grant exempting property from taxation, and there is no provision in the law itself, or general statutes, or in the constitution, reserving the right to amend or repeal it, it is held to be a contract, and all the rules and principles which are applied to the pecuniary obligations of natural persons have been applied to such a grant. Jefferson Branch Bank vs. Skelley, 1 Black, 436; Home of the Friendless vs. Rouse, 8 Wallace, 430; The Washington University vs. Rouse, id. 439; Wilmington Railroad vs. Ried 13 do., 264; The Raleigh and Gaston Railroad vs. Ried, id., 269. But I cannot refrain from quoting some remarks of Mr. Justice Miller as contained in his dissenting opinion in the case of the Washington University vs. Rouse, which seem to me to be a just criticism upon some of the decisions of that court in regard to the validity of contracts, while presenting in a most forcible manner some objections to the doctrine upon which those decisions rest. He says, speaking for the minority of the court :

"But we must be permitted to say that, in deciding the first of these propositions, namely, the validity of the contract, this court has, in our judgment, been at times quick to discover a contract that it might be protected, and slow to perceive that what are claimed to be contracts were not so by reason of the want of authority in those who profess to bind others. This has been especially apparent in regard to contracts made by legislatures of States, and by those municipal bodies to whom, in a limited measure, some part of the legislative function has been confided. * * We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to
38 give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful.

"It cannot be maintained that this power to bargain away for an unlimited time the right of taxation, if it exist at all, is limited in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the legislature can exempt, in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property; it can as well exempt persons as corporations; and no *hindrance* can be seen in the principle adopted by the court to rich corporations, as railroads and express companies, or rich men, making contracts with the legislatures as they best may, and with such appliances as it is known they do use for perpetual exemption from all the burdens of supporting the government." (Pp. 442 and 443.)

39 It seems to me that these remarks of the learned judge present a much sounder view of the principles involved in this question of constitutional law than the one adopted by the majority of the court; but however this may be, certainly under the paramount authority contained in the Constitution the right of the legislature to modify or repeal the law exempting the lands from taxation must be affirmed under the decisions of that court. In the case of House of the Friendless vs. Rouse, the legitimate and necessary inference to be drawn from the opinion of the court is, that the legislature might have resumed the power of taxation which it had relinquished if it had reserved the right to do so in the grant itself to the corporation, or by making the general law upon the subject apply to it.

But the court say the legislature in express terms withdrew the charter granting the exemption from the operation of the general statute which reserved the right to alter or repeal the grant. But the case most nearly in point, and which, indeed, it is impossible to distinguish from the one before us, is that of Tomlinson vs. Jessup, 15 Wallace, 454. In that case Jessup, of New York, an owner of a number of shares in the Northeastern Railroad Company, a corporation created in 1851 by the State of South Carolina, filed a bill against Tomlinson, and other officers of the State of South Carolina, to enjoin them from levying a tax upon the property of the road. The act incorporating the company

contained a grant of the usual powers of railroad companies, and the charter was for the term of fifty years. At this time there was in existence a general law which provided that the charter of every
40 corporation subsequently granted, and any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal by legislative authority unless the act granting the charter or the renewal, amendment, or modification in express terms excepted it from the operation of that law. In 1855 the charter of the company was amended by exempting from taxation during the continuance of the charter the stock of the company and other real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter. There was no clause in the amendatory act excepting it from the provisions of the general law reserving to the legislature the right to amend, alter, or repeal any charter granted or any modification or amendment thereof. The constitution of South Carolina, adopted in 1868, made the property of corporations then existing subject to taxation, except in certain cases, and by subsequent legislation this requirement of the constitution was carried out, and the property of the railroad company, its stock, &c., was taxed. And the sole question was whether, under the circumstances, the property was liable to taxation. The court, by an unanimous decision, held that it was, and ordered the bill to be dismissed. Mr. Justice Field, in delivering the judgment of the court, makes use of the following emphatic language:

"It is true that the charter of the company, when accepted by the corporators, constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date, and was of the same obligatory character. And it
41 may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him." But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. 'It is a provision intended to preserve to the State control over its contract with the corporators, which, without that provision, would be irrepealable, and protected from any measure affecting its obligation.'" P. 458.

Now, unless we entirely misapprehend this decision, and the grounds upon which it proceeds, it is really decisive of the case at bar. In this case, as in that, exemption from taxation, although constituting a part of the contract between the State and corporation, yet is, by the reservation of power in the fundamental law over the subject, liable to be revoked, like any other provision of the charter, whenever, in the
42 judgment of the legislature, the public interests demanded that the revocation should be made. "The reservation affects the entire relation between the State and corporation, and places under legislative control all rights, privileges, and immunities derived from its charter directly from the State."

The object and historical origin of the provision in the constitution of the State are matters known to all professional men. They were, through this paramount authority, to retain and secure to the State full power and control over corporate franchises, rights, and privileges which it might grant—a power and control which the State was, in a measure, deprived of by the Federal Constitution as that instrument had been interpreted in the celebrated Dartmouth College case. With the grant of exemption from taxation was annexed the reservation that such grant might be altered or revoked by the legislature at any time after its passage. It was a qualification of the grant, and the subsequent exercise of the reserved power cannot be regarded as an act impairing the obligation of contracts.

Precisely the same principle has been affirmed or distinctly recognized by the Supreme Court in other cases where the question has arisen. (Sherman vs. Smith, 1 Black, 587; Pennsylvania College cases, 13 Wallace, 190; Miller vs. The State, 15 do., 478; Holyoke Company vs. Lyman, id., 500; Olcott vs. The Supervisors, 16 do., 678.)

It is deemed unnecessary to dwell upon these cases, or comment
43 on them in detail. It is sufficient to state the result of them upon the question we are considering. And it is when the power is reserved in the charter itself or in the general law, to alter, amend, or withdraw the franchise or privilege granted, that this reservation qualifies the grant, and a subsequent exercise of the reserved power is not an act within the prohibition of the Federal Constitution as impairing the obligation of a contract.

But the counsel for the plaintiff company insist that the particular exercise of this reserved power in withdrawing the exemption was invalid, because it destroyed vested rights. The company proceeded to place in the market its bonds to raise money for the completion of its road, which said bonds were secured by a mortgage on said lands, and were sold to the amount of several millions of dollars mainly by reason of the immunity of the land-grant from taxation. Mr. Justice Field, in the extract already made, furnishes the answer to this argument. The original corporators or subsequent stockholders or bondholders took their interests with knowledge of the existence of this reserved right on the part of the State of repealing the exemption acts, and of the possibility of its exercise at any time, in the direction of the legislature. A repeal of the act of incorporation would likewise affect the value of the bonds and of the security. But this consideration could have no weight in determining the question whether the legislature might not revoke

or change its own grant of corporate rights. Suppose the pro-
44 vision exempting the lands from taxation for ten years, on condition the company should complete its road within two years, had been included in its charter, would this render the charter any more sacred or inviolable, or place it beyond the reach of the reserved power contained in the constitution? It seems to us very plain that it would not. The whole charter would still be subject to revocation or alteration at the will of the legislature, and the fact that the rights of bondholders would be incidentally affected by the exercise of this power on the part of the legislature could make no difference. The matter would still be within the control of the legislature, although that result might follow from its act withdrawing the corporate grant. And the case is substantially in the same attitude now.

The exemption is a corporate privilege no more valuable, no more inviolable, than the charter itself. It may be conceded that the legislature, under the power of revocation, could not divest the company of its title

to the land after it was earned nor take away its property which it had acquired. The property of the corporation, for all moral purposes, stands upon the same ground as the property of an individual, and is equally protected by the constitution. Certain property held by charitable and religious societies are exempt from ordinary taxation in this State. Still, this exemption might be revoked without interfering with the title or ownership of the property. It would throw upon this property additional burdens by removing the exemption and render the use of the property less beneficial. We shall not attempt to
45 define the limits within which this power of reservation must be exercised. This might be a difficult thing to do. It is sufficient for the purposes of this inquiry to say that, within the doctrine of Tomlinson vs. Jessup, it might be exercised to repeal the acts exempting the lands in question from taxation; for the continuance of the exemption was a privilege granted the company at the option of the legislature. It was not the same in nature and incidents as the property acquired and owned by the corporation. The legislature might resume the right of taxation which it had relinquished within the power reserved to alter or repeal the franchises and privileges of corporations. The case of State ex rel. Voight vs. Hoefflinger (31 Wis., 257) is referred to by the counsel for the company, but we do not think it has any particular bearing upon the question under consideration, and, therefore, shall not dwell upon it.

But the right of the company to an exemption of the land from taxation is placed upon another ground. It is said these lands were granted by Congress subject to the disposal of the legislature to aid in the construction of the railroad mentioned in the act, and for no other purpose. It was, therefore, not competent for the State, after accepting the grant and attempting to execute the trust, to tax them. It is not claimed that there is anything in the act of Congress prohibiting the State from taxing the lands, but that the exemption must be implied from those general principles of law regarding a trustee and his relations to the trust-estate.

46 We are unable to adopt this view. It seems to us, that when the lands were earned by the company they became its property, and, like the property of individuals, were subject to taxation. The State may doubtless relinquish its right to tax in particular cases, but it is well settled that an abandonment of this right is never presumed. As fast as the company acquired the title by the construction of the road, the trust was pro tanto executed. The right to tax existed as soon as the ownership of the lands was changed and they became private property. They then became liable to taxation and other burdens equally as the lands belonging to natural persons. Whether, if the State had at once granted the lands to the company, and the company, by a mortgage upon them, had raised money necessary to construct the road, the power of taxation could be exerted over the trust-fund or not, is a question we need not consider. The case of State ex rel. Douglas vs. Hastings, 11 Wis., 448, would have some relation to that question, but we do not perceive that it has any very direct application to the question we are considering. There is no complaint on the part of the United States that the lands are taxed and trust-estate diverted from the object of the grant. It is merely the question whether the State can tax these lands which have been acquired by the plaintiff company. And that question, we think, must be answered in the affirmative.

The judgment, therefore, of the circuit court, dismissing the complaint, is affirmed.

47 And afterwards, to wit, on the day and year last aforesaid, the following judgment was pronounced by the said supreme court and entered of record, that is to say:

THE WEST WISCONSIN RAILWAY COMPANY, appellant,
*vs.*
THE BOARD OF SUPERVISORS OF THE COUNTY of Trempealeau, respondent.

This cause came on to be heard on the appeal of the said company, and was argued by J. C. Spooner, of counsel for the appellant, and by A. W. Newman, of counsel for the respondent; and the said appellant having claimed that the act of the legislature of this State published March 22d, 1871, entitled "An act in relation to taxes on certain real estate in Tempealeau County," and the act known as chapter 139, general laws of the same year, and the authority claimed thereunder to levy taxes on the land described in the complaint, are invalid, on the ground of their being repugnant to section ten (10) of article one (1) of the Constitution of the United States, in that said act and said chapter 139, impair the obligations of the contract created between the United States and this State by the act of Congress, approved June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," and the act of Congress, approved May 5, 1864, entitled, "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,"
48 and by the act of the legislature of this State, approved October 8, 1856, being chapter 118, general laws of that year, and by its joint resolution number eight, (8,) approved March 20, 1865, by which act and joint resolution said land-grants were accepted, and by section (10) ten of article eight (8) of the constitution of this State, and the construction of said section ten (10) of article one, (1,) and of the acts of Congress above mentioned, and the validity of said act of the legislature, published March 22, 1871, and of said chapter 139, and of the authority claimed thereunder, on the ground of their being repugnant to said section ten (10) of article one, (1,) and to the acts of Congress aforesaid, as claimed by the appellant, being drawn in question in this cause, it is by the court considered and adjudged that the said act published March 22, 1871, and said chapter 139, are not repugnant to the said section ten (10) of article one, (1,) nor to said acts of Congress, but are valid; and the said appellant having also claimed that by section 1 of the act of the legislature of this State entitled "An act to aid the Tomah and Lake St. Croix Railroad Company," approved April 2d, 1864, and by the action of the said railroad company thereunder, in constructing the said railway and thereby acquiring title to the lands referred to in said section, a contract was made between the State and said company that the lands so acquired should be exempt from all taxation for ten years after the passage of said act, unless sooner
49 sold, contracted to be sold, leased, or conveyed by said company; and that by section 2 of said act, and the action of the said railroad company thereunder in mortgaging its said lands for the purpose of raising funds to build aid railroad, a contract was created between the State and the mortgagees of the said lands and the said company, that the lands so mortgaged should not be subject to taxation for ten years after the passage of said act; and the appellant having also claimed that by the act of the legislature of this State, entitled "An act to aid the

West Wisconsin Railway Company," approved March 16th, 1870, and the action of the said railway company thereunder, and especially by its completion of said road within two years after the passage of said act, a contract arose and was created between the State and said railway company, that the lands granted by Congress to aid in building said road, or so much thereof as should remain unsold by said company, should continue exempt from taxation for the further period of ten years in said act mentioned. And the appellant also claimed that said act of the legislature of this State, published March 22, 1871, declaring that all lands in the county of Trempealeau owned by any railroad company and not used for road-bed or depot purposes should be liable to taxation the same as other real estate in said county, and said chapter 139, above referred to, impair the obligations of the several contracts so
50 formed and entered into between said State and said railway company and the mortgagees before referred to, and are void on the ground of their repugnance to section 10, article 1, of the Constitution of the United States, and the construction of said sec. 10 of article 1, and the validity of the said act published March 22, 1871, and of said chapter 139, and of the authority claimed thereunder, on the ground of their being repugnant to said section 10 of said article 1, being drawn in question in this cause: Upon consideration thereof, it is by this court now here considered and adjudged that the several contracts so made between the State and the appellant or the mortgagees of its lands by the said several acts of the legislature and by the action of the appellant or said mortgagees thereunder, were respectively made with reference to section 1 of article 11 of the constitution of this State, which entered into and formed a part of such contracts; that the said act of the legislature published March 22, 1871, and said chapter 139, do therefore not impair the obligation of any contract entered into between the State and said company and the mortgagees of its lands, and are not repugnant to the Constitution of the United States, but are valid. Wherefore it is considered and adjudged that the complaint of the appellant was properly dismissed, upon the ground that the lands described therein as having been sold for the non-payment of taxes for the year 1871 became subject to taxation for that year by virtue of the acts last above referred to; and that the judgment of the circuit court dismissing said complaint be for that reason affirmed, and that the said respondent re-
51 cover of the appellant its proper costs and charges in and about its defence herein expended, taxed at dollars, and the respondents have execution thereon.

52 And afterwards, to wit, at the term last aforesaid, on the 21st day of the term, to wit, on the 21st day of July, A. D. 1874, the following order was made by said court inter alia:

THE WEST WISCONSIN RAILWAY COMPANY, appellant,
*vs.*
THE BOARD OF SUPERVISORS OF THE COUNTY of Trempealeau, respondent.

Upon filing the stipulation signed by the attorneys of the parties in this cause, bearing date July 17th, 1874:

Ordered, That the several acts of the legislature referred to in said stipulation be copied into the record of this case as part thereof, as in said stipulation the parties agreed.

53 EXHIBIT A.

An act to incorporate the Tomah and Lake St. Croix Railroad Company and to repeal and annul a portion of a grant of land heretofore made to the La Crosse and Milwaukee Railroad Company.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. William Wilson and William Carson, of Dunn County; Joseph G. Thorp and Richard F. Wilson, of Eau Claire County; Andrew K. Gregg, sen., and Hiram S. Allen, of Chippewa County; Augustus Gaylord, of Polk County; N. S. Dunbar and Charles B. Cox, of Pierce County; Herman L. Humphrey, of St. Croix County; Miles D. Prindle, of Pepin County; George W. Gilkey, of Buffalo County; R. C. Field, of Trempealeau County; Carl C. Pope and William T. Price, of Jackson County; Richard Dewhurst, of Clark County; and C. D. Spaulding, of Monroe County; and such other persons as shall become stockholders in the corporation hereby created in accordance with the provisions of this act, shall be and they are hereby created a body corporate and politic by the name and style of the "Tomah and Lake St. Croix Railroad Company," and by that name shall have perpetual succession, be competent to contract and be contracted with, sue and be sued, implead and be impleaded, answer and be answered, defend and be defended, in any court whatever; but shall never set up the defense of usury in any court whatever. The said corporation may make, have, and use a common seal, which it may
54 alter or renew at pleasure; it shall be capable of acquiring by deed, lease, or other conveyance, a fee-simple or any less estate in lands, tenements, or easements in the same, and of conveying any such estate or interest by deed, lease, or other conveyance, or of holding such estate or interest, or any other estate, either real, personal, or mixed; and shall have and enjoy all the privileges, franchises, and immunities incident to a corporation, and may do and perform all and singular the acts and matters which to any corporation it shall lawfully appertain to do and perform for the well-being of said corporation.

Corporators.

Name and powers.

SECTION 2. The capital stock of said corporation shall be four million dollars, and shall be divided into eighty thousand *share* [shares,] of fifty dollars each, and shall be subdivided in the manner hereinafter provided.

Capital stock.

SECTION 3. The said William Wilson, William Carson, Joseph G. Thorp, Richard F. Wilson, Andrew K. Gregg, sen., Hiram S. Allen, Augustus Gaylord, N. S. Dunbar, Charles B. Cox, Herman L. Humphrey, Miles D. Prindle, George M. Gilkey, R. C. Field, Carl C. Pope, William T. Price, Richard Dewhurst, and C. D. Spaulding are hereby appointed commissioners to receive subscriptions to the capital stock of said company, a majority of whom shall constitute a quorum, and shall have authority and power, and are hereby authorized and empowered, to do any act or thing *by* which the commissioners, by virtue of this act, may do

Commissioners to receive subscriptions.

Notice of meeting to receive subscriptions.

or perform. The said commissioners shall give notice, by publication for three successive weeks in one newspaper printed in each of the several counties of Monroe, Clark, Jackson, *Trempeleau*, [Trempealeau,] Buffalo, Eau Claire, Chippewa, Dunn, Pepin, Pierce, St. Croix, and Polk, of the time and place when and where they will meet to receive subscriptions to the capital stock of said corporation; and at such meeting shall prescribe rules as to the manner in which subscriptions to the capital stock of the company shall be made, the amount, not less than five dollars, to be paid upon each share at the time of such subscription, and the times and place of payment of the remainder, which rules shall be entered at length on the books of subscription. The books of subscription shall be kept open until the whole number of shares shall be subscribed, when they shall be closed and no more subscriptions be received by the commissioners.

Rules relating to subscriptions.

When books to be closed.

First election of directors.

SECTION 4. Whenever five thousand shares of the capital stock shall be subscribed in conformity with the rules prescribed by the commissioners, and the amount prescribed by such rules paid upon each share so subscribed, the *commissioner* [commissioners] shall give notice to the stockholders, by publication for three or more successive weeks in said newspapers printed in the several counties aforesaid, to meet at a time and place to be specified in such notice, to elect fifteen directors of said corporation, who shall hold their office until other directors are elected in pursuance of the by-laws of said corporation.

Survey and location of road.

SECTION 5. The said company shall have authority and power, and they are hereby authorized and empowered, to survey, locate, construct, complete, alter, change the location of, reconstruct, maintain, and operate a railroad, with one or more tracks or lines, on such route, and with such allignment and graduation as said company shall think proper; from such point as the directors shall determine in the town of Tomah, in the county of Monroe, or on the track of the Milwaukee and La Crosse railroad, or of any other railroad running out of Tomah by way of Black River Falls, thence by the most feasible route to such point on Lake St. Croix, between townships twenty-five and thirty-one, as the directors shall determine, and the said company shall have authority and power to take, transport, and convey persons and property upon said railroad by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them, and to make, construct, and put in operation all such turnouts, side-tracks, and tracks connecting such road with any other which it may intersect, as they shall think will promote the interests of the company; to erect and construct all depots, station-houses, warehouses, car-houses and shops, engine-houses and shops, machine-shops, and other fixtures useful for the accommodation of said road, and of those using it; to manufacture or purchase all necessary engines, tenders, cars, or other conveniences for running said road; and said company shall have power to connect its railroad with any other railroad in the State, and to operate the

Transportation of passengers and freight.

Turnouts, &c.

Depots, &c.

Engines, &c.

Connections.

same in connection with such other railroad; and
57 perpetually or for a limited time to lease or to purchase from any other railroad company the whole or any part of any railroad owned by any such company; and shall also have authority and power, and it is hereby authorized and empowered, to lease to any person or persons, company or corporation, perpetually or for a limited time, the whole or any part of the said railroad to be constructed or owned by this company, together with the rolling-stock, machinery, buildings, tenements, or fixtures, and all other property, real, personal, or mixed, of the said company, and all the franchises, rights, privileges, and immunities of this company, or to sell the same, and in consideration of such lease or sale to take or receive such rents or payments as the directors of this company shall think proper.

May lease or purchase other roads, or lease or sell their own.

SECTION 6. All the affairs of said company shall be managed by a board of fifteen directors, who shall be stockholders, and who are hereby invested with all the powers of the corporation. They shall be chosen annually by ballot, by the stockholders, at the annual meeting of the company, which shall be held on such notice and at such time as shall be prescribed by the by-laws, and at such place as shall be prescribed by the board of directors, and stated in such notice. At all meetings of the stockholders, every stockholder shall be entitled to one vote for each share of stock held by him or her, and may vote in person or by proxy duly authorized; and no business shall be transacted at any meeting of the stockholders, unless a majority of the stock is represented. In all elections of directors,
58 the persons receiving a majority of all the votes representing the stock subscribed shall be deemed and declared duly elected. The elections shall be conducted in such manner as shall be prescribed by the by-laws of the company; and if from any cause an election of directors shall not be had at the time when, by the provision of this act or of the by-laws, it should be had, the same may be held at any other time, on notice to be given as aforesaid; and until such election be had, the directors of the preceding year shall continue to act, and the corporation hereby created shall not forfeit or lose any of its privileges, franchises, or immunities, by reason of the irregularity or want of such election, nor by reason of any abandonment or nonuser of such privileges, franchises, or immunities, for a less period than ten consecutive years; but in case of any abandonment or nonuser of such privileges, franchises, or immunities for such period, the same shall be forfeited. The board of directors may, at any time, increase or diminish the number of directors to be elected at the next annual meeting of the stockholders; and the number to be elected shall be specified in the notice of election, but shall never be less than nine nor more than fifteen.

Board of directors.

Failure to elect not a loss of franchise.

Number of directors.

SECTION 7. A majority of the board of directors shall constitute a quorum for the transaction of any business. They shall meet at such times and places, and be convened in such manner, as they shall decide upon. They shall elect one of their own number to be president, and

Quorum and meetings.

President and vice-president.

59 one to be vice-president. The president shall, when present, preside at all meetings of the board and of the stockholders, and, when absent, the vice-president shall discharge the duties of president, and, when both are absent, the directors may appoint a president pro tem.

Executive committee and other officers.

The board of directors shall have power to appoint an executive committee and prescribe its powers and duties, to appoint a secretary, treasurer, and such engineers, superintendents, agents, and other officers as they may deem necessary, and remove them at pleasure, prescribe their duties and compensation, and may demand adequate security for the discharge of their respective duties and trusts. The

Vacancies.

directors shall have power to fill any vacancy which may occur in their own board. The directors shall issue a cer-

Certificates of stock.

tificate or certificates to the stockholders for the number of shares held by them, respectively, signed by the president and secretary, which shall be transferable in such manner and at such place or places as shall be prescribed by the by-laws, and for the purpose of such transfer they may establish transfer agencies out of this State; and such shares shall be deemed personal property. The directors

Tariff of prices.

shall have power to prescribe a tariff of prices for the transportation of freight and passengers, and to alter or change the same, or, in their discretion, to empower the superintendent or other agents to prescribe or alter such tariff. The directors shall have authority and power, and they are

Contracts for construction and lease of road.

hereby authorized and empowered, to make such covenants, contracts, and agreements with any person or persons,

60 copartnership or corporation whatsoever, as the construction of their railroad or its management, and the convenience and interests of the company and the conduct of its affairs may, in their judgment, require; and also to make any contract or agreement which they shall think proper, with any person or persons, company or corporation leasing to such person or persons, company or corporation, perpetually or for a limited time, the whole or any part of the railroad to be constructed or owned by this company, together with the rolling-stock, machinery, buildings, tenements, or fixtures, and all other property, real, personal, or mixed, of this company, and all the franchises, rights, privileges, and immunities of this company, and reserving or receiving rents therefor, or to sell the same. The

By-laws, &c.

directors shall also have power and authority to make, prescribe, and establish such by-laws, rules, orders, and regulations, not in conflict with or repugnant to the constitution or laws of this State or of the United States, as they shall think best, for the well-ordering of the affairs of said company, and, in general, to superintend and direct all of the operations, receipts, disbursements, and all other affairs and proceedings of said company.

Annual exhibits of affairs of company.

SECTION 8. At each annual meeting of the stockholders for the election of directors, the directors of the preceding year shall exhibit to the stockholders a complete statement of the affairs and proceedings of the company for such year. Special meetings of the stockholders may be

Special meetings.

61 called by order of the board of directors, or by stock-

holders holding one-half in amount of the *capitol* [capital] stock, on like notice as that required for annual meetings, which notice shall specify the object of the meeting.

May borrow money, and execute notes, bonds, mortgages, &c.

SECTION 9. The said company shall have authority and power, and it is hereby authorized and empowered, in its corporate capacity, to borrow any sums of money from any person or persons, corporation or body-politic of any kind, and for any rate of interest which may be agreed upon by and between said company, and *and* any person or party of whom such money may be obtained; and to make, execute, and deliver all necessary writings, notes, bonds, mortgages, or other papers and securities, in amount and kind, as may be deemed expedient by said corporation, in consideration of any such loan, or in the discharge of any liabilities that it may incur in the construction, repair, equipment, or running of said road; and the powers of the said corporation, for the purposes aforesaid, and for all purposes necessary to carrying out the objects of said company, namely, the construction of a railroad from and to the points aforesaid, are hereby ratified and confirmed, and the contracts and official acts of said company declared binding in law and equity upon said corporation, and upon all other parties to such contracts. Said company shall also have authority and power, and it is hereby authorized and empowered, in its corporate capacity, to make, execute, issue, and deliver its bonds or obligations, from time to time, and at any
62 time, in such an amount that all the bonds of said company outstanding at any one time will not exceed the amount of the *capitol* [capital] stock of said company. The directors of said company are hereby authorized and empowered to prescribe, by resolution to be by them adopted the sum or sums for which each of such bonds shall be issued, the time or times and place or places when and where the principal and interest of the same shall be payable, the person or persons, trustees or corporation to whom the same shall be payable, and whether payable to order or to bearer, or how otherwise negotiable, the rate of interest which such bonds shall bear, and the manner and form in which the interest-coupons annexed to them shall be executed; and to secure the payment of any or all of such bonds, the said corporation is hereby authorized and empowered, in its corporate capacity, to make, execute, and deliver a mortgage or deed of trust upon the whole or any part of its railroad, constructed or authorized to be constructed, and of any or all of its estate, real, personal, or mixed, in possession or expectancy, owned and acquired, or to be thereafter owned and acquired, by said corporation; and the said company is also hereby authorized and empowered, in and by such mortgage or deed of trust, to confer upon the trustee or mortgagee full and ample powers to enter into and upon, and to take possession of, have, use, and enjoy, or to sell and dispose of the whole or any part of said railroad
63 or its estate, together with the functions appertaining to said railroad, and all corporate and other franchises, rights, and privileges of said corporation. And *and*

Amount of bonds, interest on same, &c.

Mortgage or deed of trust to secure payment of bonds.

Power of trustees or morgagee.

Form of mortgage or deed of trust.

Sinking-fund for payment of bonds.

the directors of said company are hereby authorized and empowered to prescribe, by resolution to be by them adopted, all matters relating to the form and terms of any such mortgage or deed of trust, and of its execution and delivery; and they are authorized to provide for the periodical payment [of] to such trustee or receiver as they shall appoint, a certain sum, to create a sinking-fund with which to pay off or discharge at or before maturity any or all of the bonds by them authorized to be issued, and also to provide the manner in which such trustee or receiver shall pay out or dispose of said sinking-fund, and to authorize him to designate by lot, or in any other suitable manner, the bond or bonds to the payment of which such sinking-fund, or any part of it, shall be applied; and the said railroad company is hereby fully authorized and empowered, by its treasurer, agents, or brokers, or otherwise, at any place to sell, pledge, hypothecate, or otherwise dispose of any or all of the aforesaid bonds hereby authorized to be issued, at par or at any price less than par, and for such sum or sums, and on such terms as [to] the said company shall appear most for the interest of said company; and the said company, and its directors, officers, agents, and brokers, are hereby authorized and empowered to have, exercise, and enjoy all the rights, privileges, and powers hereby conferred upon them respectively, any law of this State to the

Sale of bonds.

Mortgage or deed of trust to be recorded in office of sec'y of state, &c.

64 contrary notwithstanding. And any such mortgage or deed of trust, and every discharge or *sattisfaction* [satisfaction] thereof, may be recorded in the office of secretary of state, in a proper book kept for that purpose, and the certificate of such recording, endorsed on such mortgages or deed of trust, shall have the same effect as if such mortgage or deed of trust was recorded in the several counties through which such road may run, and such record in the office of the secretary shall be sufficient notice to all persons.

May enter upon lands, survey and locate road, and use lands on line of same.

SECTION 10. The said corporation shall have authority and power, and is hereby authorized and empowered, by its officers, engineers, and agents, to enter upon any land for the purpose of exploring, surveying, locating, or determining the route of its railroad; and when the route of said railroad shall be determined by said company, by resolution adopted by the board of directors, the company *also* [shall] have authority and power, and it is hereby authorized and empowered by its agents, officers, engineers, contractors, employees, and servants, to enter upon, take, possess, occupy, and use any land along and including the line of said route not exceeding one hundred feet in width; and said company shall also have authority and power, and it is hereby authorized and empowered, at any time to enter upon, take, possess, occupy, and use any other lands beyond the limits of one hundred feet which shall be necessary for the use of said company, for the purpose of erecting depot building', stopping-stages, station-houses, freight-houses, warehouses, engine-houses,

Purposes for which other lands may be taken.

65 machine-shops, or for buildings or fixtures of any kind, or grounds about any such buildings, houses, or

fixtures, for the convenient operation of the business of the road, or for the purpose of removing such substances and things as may endanger, obstruct, or interfere with the free use of said road, or for the purpose of making deep cuts or excavations, or for the purpose of depositing earth, gravel, or stone or for the purpose of obtaining earth, gravel, stone, or other materials for embankments, structures or superstructures necessary to or for the construction, completion, alteration, *maintainance* [maintenance] preservation and complete operation of said railroad; and a copy of said resolution, duly certified by the secretary of said company, shall be recorded in the office of the register of deeds of the county in which the lands described in the resolution shall lie. And all private property which the said corporation is by this act authorized to take is hereby declared to be taken for public use. And the said company shall at such time and in such manner as is prescribed by this act, pay the full value of all lands so taken, possessed, occupied or used, which value shall be ascertained in the manner hereinafter provided, and whenever the same shall have been paid, tendered, or deposited, as provided in this act, the title in and to any and all such lands shall become vested in said company for the purpose of said railroad; and whenever the company shall deem that the same or any part thereof shall be no longer necessary for the purpose for which the same were taken, the said company is
66 hereby authorized and empowered to lease or sell the same, or any part thereof.

Compensation for lands.

SECTION 11. Whenever the line of said railroad shall be located, and its route determined, the said company shall apply, by attorney, to the circuit court for the county through which it passes, or to the judge thereof, in vacation, for the appointment of three commissioners to make an *apprisal* [appraisal] and award of the value of any and all lands which are the private property of any person on the line of said railroad, and which the said company shall have entered upon, taken, possessed, occupied, or used, or which it may thereafter enter upon, take, possess, occupy, or use for any of the purposes for which by this act the said company is authorized to enter upon, take, possess, occupy, or use lands. The said company shall give notice of its intention to apply for the appointment of such commissioners, by publishing the same at least ten days before the time for hearing such application, in at least one newspaper published in the county in which such land shall be; and upon an affidavit of the publication of the same, the court or judge to whom the application shall be made, shall appoint three commissioners, who shall have cognizance of all cases arising on the line or route of said railroad; and they shall proceed to examine the premises in each case *seperately*, [separately,] having first given such notice as they may deem reasonable to the owner, and at least five days' personal notice to such owner, if resident in the
67 county; and whenever it shall appear to said company or its officers that the title to such land is in dispute, or that several parties, claim interest therein by

Application for appointment of commissioners to appraise damages.

Notice of application to be published.

Appointment of commissioners.

Examination of premises.

If title in dispute, notice to be given to claimants.

tax-sales, tax-titles, incumbrances, liens, or equitable claims, the said commissioners shall, upon request of said company or its officers, give notice to all persons claiming any interest in such lands; whether as owners, *incumbrances*, [incumbrancers,] or otherwise; (and when the person to be notified has no known residence in this State, within the knowledge of such commissioners, this notice may be by publication in a newspaper, for such length of time as the commissioners shall deem reasonable;) and after making such examination, the said commissioners, or a majority of them, shall, in each case, *seperately*, [separately] make an apprais'ment and award of the value of the land so entered upon, taken, possessed, occupied, or used by said company for any of the purposes aforesaid, at the time when the same was so entered upon and taken, and shall deliver one copy of their award, in each case, to the said company, and shall file another in the office of the clerk of the circuit court of the county in which said land shall lie; with the costs of the award taxed upon each of said copies; and if neither party shall appeal from said award, in the manner hereinafter provided, the said circuit court, on motion of the party in whose favor any award shall be made for such value as aforesaid, unless such award shall have previously been paid, shall enter up judgment in conformity with such award.

Award of damages.

One copy of award to be filed.

Entering up judgment if neither party appeal.

Vacancies.

68 And in case either of said commissioners shall die, resign, or decline to act, the said court or judge shall appoint another commissioner in his stead. The said company, or any party receiving notice from the said commissioners as aforesaid, may, within thirty days after such award shall have been filed with the clerk as aforesaid, appeal from the same to the circuit court of the county in which such award shall *be filed* [by filing] with the clerk of said court a written notice of such appeal. Upon receiving such notice, the said clerk shall enter the appeal as a case upon the docket of the court, setting down the owner or owners, and person or persons claiming any interest in said land, embracing all persons so having received such notice from said commissioners as plaintiffs, and the said company as defendant; and the said court shall proceed to hear and determine such case in the same manner that other cases are heard and determined in such court; and all issues of fact arising therein shall be tried by a jury, unless a jury be expressly waived by both parties. The appellant shall not be entitled to have the case tried at any term of said court unless he shall give notice to the appellee or his attorney, at least ten days before the first day of the term, that he will demand a trial at such term; but in case the appellee has no known residence in this State, or attorney of record residing therein, no such notice need be given. In all cases the appellee may waive such notice, in which case the same rule for trial shall be applicable to it as to other cases in said court.

Appeal and trial of cases.

Assessment of damages, and entering up judgment.

69 After the hearing of such case the jury, or if a jury be waived, the court shall assess the value of the lands so entered upon, taken, possessed, occupied, and used by said company at the time when the same was entered upon

and taken, and after such assessment the court shall proceed to render judgment against said company for the amount of said assessment, in favor of the plaintiff or plaintiffs in such case. If the amount so assessed in favor of the said plaintiff or plaintiffs shall exceed the amount awarded by said commissioners, with interest at the rate of seven per cent. per annum from the time of such award to the time of such assessment by the jury or court, then judgment shall be rendered against said company for costs, and if it shall not exceed such amount and interest as aforesaid, then judgment shall be rendered in favor of said company for costs, and against the said plaintiff or plaintiffs, and execution may issue accordingly. Either party shall be entitled to a change of venue for the trial of such cause, on affidavit filed stating the belief of the person making the affidavit that a fair trial cannot otherwise be had. The change of venue shall be to the nearest county where a fair trial can be had. The judgment of the circuit [court] may be reviewed on appeal or writ of error, as other case at law. Whenever the commissioners shall make an award as aforesaid, and no appeal shall be taken from the same, or whenever, in case of appeals, a final judgment shall be rendered, it shall be the duty of the company, and not, before to pay to the party entitled to the same the amount of said award or judgment, and in any case where there shall be any lien, incumbrance, tax-sale, tax-title, or equitable claim to or upon the land, or any part thereof, which is the subject-matter of such award or judgemnt, or when more than one person shall be entitled to or shall set up any claim to the amount of such award or judgment or any part of it, or when the person entitled to receive the same shall not have any known residence within the State, the said company may deposit the amount of such award, when there is no appeal, with the clerk of the court with whom the award in the case shall have been filed, and in case of an appeal and judgment thereon the company may deposit the amount of such judgment with the clerk of the circuit court in which such judgment shall have been rendered, and the money so deposited, in either case, shall be paid over by order of the circuit court to the person or persons who shall be adjudged to be entitled to receive the same. Whenever the amount of such award or judgment shall have been paid, tendered, or deposited as aforesaid, an absolute estate, in fee-simple, in such lands shall be and become vested in said company, and all persons so receiving notice from the said commissioners, and all persons claiming under them, shall be forever concluded from questioning such title so acquired by the said company. Said company shall have full power and authority, after entering upon and taking such lands, to have, hold, possess, occupy, use, and enjoy the same for any of the lawful purposes of the said company from the time of such entry and taking until the proceedings provided for by this act shall have been finally determined, and until said company shall have refused, after demand made, to pay the value of the land so ascertained as aforesaid; and the said company

Costs.

Change of venue.

Review.

When company to pay damages.

In case of lien, &c., award may be deposited.

When title shall become vested in company.

Company to enjoy possession of lands until damages are finally determined.

shall not, during such time nor until such refusal, be disturbed in such possession or occupancy, use or enjoyment, by any proceedings, either in law or equity.

May construct road alongside of or across other roads.

SECTION 12. The said company shall have the right, authority, and power, and it is hereby authorized and empowered, to construct its said railroad across, over, or under any railroad it may intersect; upon and along, across, under or over any public or private highway, road, street, plank-road, (or railroad), if the same shall be necessary; but the said company shall put said highway, road, street, plank-road, or railroad in such condition and state of repair as not to impair or interfere with its free and proper use; and also to erect and maintain all necessary bridges for the use of their railroad over any stream of water or water-course, at such points of crossing the same as said road may be located, with all necessary abutments, piers, arches, and foundations.

Penalty for injury to road, &c.

SECTION 13. If any person shall *wilfully* [willfully,] or knowingly injure or destroy any part or portion of the railroad so to be constructed, or any works, buildings, or machinery attached to or in use upon the same, belonging to said company, or shall *wilfully* [willfully] and maliciously place any obstruction or thing upon the track of said railroad, such person or persons so offending, shall each of them, for every such offense, forfeit and pay to said company three times the amount of damages caused by such offense,
72 which may be recovered in the name of said company in any court having competent jurisdiction. Such person or persons shall also be subject to indictment, and, on conviction of any such offense, shall be punished by fine and imprisonment in the State prison, or either, at the discretion of the court; and in case any accident shall occur in consequence of any such obstruction or damage to said road or machinery, whereby the death of any person shall be caused, the person so offending shall, on conviction, be adjudged guilty of murder in the first degree, and punished accordingly, in such manner as shall be prescribed by law for the punishment of murder in the first degree.

Land granted in aid of construction of road.

SECTION 14. For the purpose of aiding in the construction of said railroad, there is hereby granted to the "Tomah and Lake St. Croix Railroad Company," herein created, all the interest and estate, present and prospective, of this State, in and to so much of the lands granted by the Government of the United States to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of the city of Portage, to the St. Croix River or Lake, and from thence to Lake Superior and to Bayfield, by virtue of an act of Congress entitled "An act granting a portion of the public lands to the State of Wisconsin to aid in the construction of railroads," approved June 3d, 1856, as is or can be made applicable to the construction of that part of said railroad lying between
73 the village of Tomah, in the county of Monroe, and Lake St. Croix, [in] this State, together with all and singular the rights, privileges, and immunities conferred or intended to be conferred by said act of Congress, to so much of said grant of land; and the same are hereby granted to

the said Tomah and Lake St. Croix Railroad Company, except as hereinafter provided. The title of said lands shall vest in said Tomah and Lake St. Croix Railroad Company, in manner following, that is to say: Whenever twenty continuous miles of said railroad between Tomah and Lake St. Croix shall have been completed, so as to admit of running regular trains on the same, the governor of this State shall certify to the Secretary of the Interior the fact that twenty continuous miles of such road are completed as aforesaid; then the title to one hundred and twenty sections of said land shall vest in the said Tomah and Lake St. Croix Railroad Company; and when a second twenty continuous miles of said road shall have been completed, so as to admit of running regular trains on the same, the governor shall certify as above, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company; and so, from time to time, until said road shall have been entirely completed: provided, the Tomah and Lake St. Croix Railroad Company shall not, for the purpose of aiding in the construction of said railroad from Tomah to Lake St. Croix, encumber any of the lands to which said company is to be entitled on the completion of the
74 road as herein provided; and provided, further, that the said railroad shall be completed on or before the third day of June, 1866.

When title to vest in company.

Lands not to be encumbered.

SECTION 15. The governor of this State, in his official capacity, and in behalf of the State and under the great seal thereof, shall execute and deliver to the Tomah and Lake St. Croix Railroad Company, or their legal representatives or their assignees, whenever, by virtue of the provisions of this act said company shall be entitled to any of said lands, a deed in fee-simple of any and all of the lands to which the said company may be entitled.

How deed to lands to be executed.

SECTION 16. If it shall appear, upon the location of said road, that any of the lands granted by the act of Congress aforesaid, applicable to the construction of said road, have been sold or disposed of by the United States, the governor, upon application of said company, shall appoint such agent or agents, as may be necessary to select and locate other lands in lieu thereof, as provided in the act of Congress aforesaid; and such selections shall be made at the expense of said railroad company, and no part of said expense shall be paid out of the State treasury. Such railroad shall be and remain a public highway for the use of the Government of the United States, free from tolls and other charges upon the transportation of property or troops of the United States, and the United States mail shall be transported over
75 said road, under the direction of the Post-Office Department, as provided in said act of Congress.

Other lands may be selected.

U. S. troops, &c. to be transported free.

SECTION 17. This act and the grant herein contained shall cease and be void unless the said Tomah and Lake St. Croix Railroad Company shall accept the same within six months after the taking effect of this act. Such acceptance shall be by resolution adopted by the directors of said company, a copy of which, duly certified by the secretary

When grant to be void.

of said company, within the said period of six months, shall be deposited in the office of the secretary of state.

Repeal.

SECTION 18. So much of an act entitled "An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved October 11th, 1856, and so much of the grant of lands as by said act *were* [was] made to the La Crosse and Milwaukee Railroad Company, as is or can be made applicable to the construction of a railroad from Tomah, in the county of Monroe, to Lake St. Croix, in this State, and all and singular the rights, privileges, and franchises thereby conferred, granted, and conveyed to the said La Crosse and Milwaukee Railroad Company, so far as the road from Tomah to Lake St. Croix, and the lands herein granted to aid in the construction of the same are concerned, are hereby repealed, revoked, and annulled, and declared void.

Public act.

SECTION 19. This act is hereby declared to be a public act, and shall take effect and be in force from and after its passage and publication.

Approved April 1, 1863.

76 EXHIBIT No. 1.

An act to accept the grant and execute the trust conferred upon the State of Wisconsin by an act of Congress entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3d, 1856.

The people of the State of Wisconsin, represented in senate and general assembly, do enact as follows:

To accept land-grant.

SECTION 1. That the lands, rights, powers, and privileges granted to and conferred upon the State of Wisconsin by the act of Congress entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3d, 1856, be, and the same are hereby, accepted, upon the terms, conditions, and restrictions contained in said act of Congress, and the said State of Wisconsin hereby assumes and undertakes the trust created by the said act of Congress.

SEC. 2. This act shall be in force so soon as the same is published.

Approved October 8th, 1856.

EXHIBIT No. 2.

An act to aid the Tomah and Lake St. Croix Railroad Company.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

Exempt from taxation for ten years.

77 SECTION 1. All lands hereafter acquired by the Tomah and Lake St. Croix Railroad Company, *and* [of] which the title in fee to said lands, or any part thereof,

may become vested in said company by and pursuant to the act of Congress entitled "An act granting a portion of the public lands to the State of Wisconsin to aid in the construction of railroads," approved June 3d, 1856, and the laws of the State of Wisconsin granting and conferring rights thereto under and by the act of incorporation of said railroad company and the acts amendatory thereto, shall be exempt from all taxation for ten years from and after the passage of this act.

Lands when sold subject to taxation.

SECTION 2. In case any such lands shall be sold, contracted to be sold, leased, or conveyed by said company, or any person or persons for said company, then such lands shall become subject to taxation immediately, and the exemption provided for by this act shall no longer apply to such lands: Provided, the said lands may be mortgaged for the purpose of raising funds to build said railroad, without being subject to taxation for the time aforesaid.

SECTION 3. This act shall take effect and be in force from and after its passage.

Approved April 2, 1864.

## EXHIBIT No. 3.

An act to confer upon the Tomah and Lake St. Croix Rail road Company all the rights and privileges granted and conferred to the State of Wisconsin by the acts of Con-
78 gress approved June 3d, 1856, and of May 5th, 1864.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

Certain right and privileges conferred on T. and L. St. C. R. R.

SECTION 1. That there be, and is hereby, granted to and upon the Tomah and Lake St. Croix Railroad Company all and singular the rights, privileges, and interest granted and conferred and bestowed to and upon the State of Wisconsin by an act of Congress approved May 5th, 1864, any and all the lands in said act of Congress mentioned, granted, and conferred to the State of Wisconsin for the purpose of aiding in the construction of a railroad from the town of Tomah, in the county of Monroe, in said State, to the St. Croix River or Lake, between townships 25 and 31, and also all the lands, rights, and privileges heretofore granted by this State to and upon said company to aid in building said railroad, as above described, which were embraced in the act of Congress granting lands to the State of Wisconsin, approved June 3d, 1856, is hereby confirmed, and hereby conferring, granting under said railroad company the every right and privilege as to the extension of time for building said railroad which is given to said State by said act of Congress, and all and singular every other provision of said act of Congress relative to said lands in both of said grants herein referred to: Provided, said grant is subject to the same conditions and restrictions which are imposed on said State by said acts of Congress respectively.

How far lands subject to taxation.

SECTION 2. And be it further enacted, That all other
79 lands which said railroad company may so acquire under

the said act of Congres, approved May 5th, 1864, shall only be subject to the same mode, extent, and rules of taxation as heretofore provided for by the laws of this State by an act approved April 2nd, 1864, as to lands which it might acquire under the said act of Congress, entitled "An act granting a portion of the public lands to the State of Wisconsin to aid in the construction of railroads," approved June 3d, 1856.

Repeal. SECTION 3. All previous laws of this State contravening or militating against this act, are hereby repealed.

SECTION 4. This act shall take effect and be in force from and after its passage and publication.

Approved March 29th, 1865.

EXHIBIT No. 4.

An act to amend section 14, chapter 243, of the session laws of 1863, entitled "An act to [amend an act to] incorporate the Tomah and Lake St. Croix Railroad Company," approved April 1st, 1863.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Section 14, chapter 243, of the session laws of 1863, is hereby amended by striking out all after the word "completed," in line thirty-nine in said section.

SECTION 2. This act shall take effect and be in force from and after its passage.

Approved April 6th, 1866.

80 EXHIBIT No. 5.

An act to extend the time exempting certain lands from taxation.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

Extended to June, 1871. SECTION 1. All the lands granted by the act of Congress approved June 3, 1856, and the acts amendatory thereof, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," are hereby exempt from taxation and from assessments of any kind, up to the 3d day of June, 1871, the time limited by Congress for the completion of the roads and carrying out the terms of the grant, having been extended to that date; provided, that such lands, or any part thereof, shall not be exempt from taxation from and after the time the same shall be sold, contracted to be sold, leased, or in any manner conveyed by any railroad company; and provided, further, that such exemption shall not extend to any lands which may now be or hereafter improved.

Provisos.

SECTION 2. This act shall take effect and be in force from and after its passage.

Approved April 9th, 1866.

EXHIBIT No. 6.

An act to legalize the organization of the Tomah
81 and Lake St. Croix Railroad Company, with leave granted to change the name of said company.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

Proceedings legalized.

SECTION 1. All the acts and proceedings of the commissioners named in the charter of the Tomah and Lake St. Croix Railroad Company, to open the books, receive subscriptions to the stock of said company, and all the subsequent proceedings in the organization of said corporation, are declared legal and valid.

Name may be changed to West Wisconsin Railway Co.

SECTION 2. The directors of said company may, by a resolution of their board of directors, change their corporate name from the Tomah and Lake Saint Croix Railroad Company to West Wisconsin Railway Company, and when said resolution shall have been passed, all the grants, rights, and privileges of every name and nature given and bestowed to and upon the Tomah and Lake Saint Croix Railroad Company shall inure to and vest in the West Wisconsin Railway Company as fully and amply as if the same had been granted to and bestowed upon the said West Wisconsin Railway Company.

SECTION 3. This act shall take effect and be in force from and after its passage.

Approved April 5th, 1866.

EXHIBIT No. 7.

An act to aid the West Wisconsin Railway Company.

Time extended.

The people of the State of Wisconsin, represented
82 in senate and assembly, do enact as follows:

SECTION 1. That the time in the act entitled "An act to aid the Tomah and Lake St. Croix Railroad Company, now the West Wisconsin Railway Company," approved April 2, 1864, and the acts supplementary thereto in relation to taxing the lands granted by Congress to aid in building the road of said company, be further extended for ten years, for that or any portion of said lands that shall remain unsold by said company; but in case said railway company shall sell, or contract to sell, or lease all or any portion of their lands to the Wisconsin Colonization Company, or any other company, or to individuals, the purchaser or purchasers shall not have or receive any benefit from such extension, any law to the contrary notwithstanding.

Shall furnish list of lands.

SECTION 2. It shall be the duty of the West Wisconsin Railway Company, when applied to by the proper officers of any town, city, county, or State within the limits of their grant, to furnish a true list of lands sold, contracted to be sold or leased, that they may be properly assessed and taxed according to law; and it is further provided, and this act is upon the express condition that if the said railway company shall not have built their said road within

two years from the passage of this act, then, and in that case this act shall be null and void; provided, that this act shall not apply to Pierce County.

SECTION 3. This act shall take effect and be in force from and after its passage.

Approved March 16, 1870.

83 EXHIBIT No. 8.

*Cah*pter 356, Pr. & L. laws, 1871. (Published March 22, 1871.)

An act in relation to taxes on certain real estate in Trempealeau County.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

Shall be liable to taxation.

SECTION 1. From and after the passage and publication of this act, all lands in Trempealeau County owned by any railroad company, not used for road-bed or depot purposes, shall be liable to taxation the same as other real estate.

Clerk of the board to obtain list.

SECTION 2. It shall be the duty of the clerk of the board of supervisors of Trempealeau County to obtain a list of all lands, the title of which is in any railroad company, and which by this act are made liable to taxation, and furnish assessors of each town in which said lands are situated an abstract of all such lands in their respective towns, ten days prior to the time for the assessment of taxes each year.

SECTION 3. This act shall take effect and be in force from and after its passage and publication.

(Received at the executive office March 15, 1871, and deposited with the secretary of state March 20, 1871. The foregoing act having been presented to the governor for his approval, and not having been returned by him to the house of the legislature in which it originated, within the time prescribed by the constitution of the State of Wisconsin, has become a law without his approval.)

84 EXHIBIT No. 9.

Chapter 139. General laws, 1871.

An act to amend section two of chapter 104 of the general laws of 1870, entitled An act to aid the West Wisconsin Railway Company.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

Amended.

SECTION 1. Section two of chapter 104 of the general laws of 1870, is hereby amended by striking out the word "county" at the end of the last line, and adding thereto the words "and Trempealeau Counties."

SECTION 2. This act shall take effect and be in force from and after its passage.

Approved March 24, 1871.

EXHIBIT No. 10.

Joint resolution accepting the lands granted to the State of Wisconsin by an act of Congress entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," approved May 5th, 1864.

Resolved by the senate, (the assembly concurring,) That the lands granted to the State of Wisconsin for the purpose of aiding in the construction of certain railroads within this State, by virtue of an act of Congress entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," approved May 5th,
85 1864, be, and the same are hereby, accepted by the State of Wisconsin, subject, however, to all the conditions of said act of Congress. And the State of Wisconsin hereby consents to execute the said trust created by the aforesaid act of Congress, pursuant in all things to the terms, limitations, and conditions of said act.

Resolved that the secretary of state be, and he is hereby, authorized and required to transmit a certified copy of this resolution to the Secretary of the Interior of the United States.

Approved March 20, 1865.

86 Supreme court, State of Wisconsin.

THE WEST WISCONSIN RAILWAY COMPANY, appellant,
*vs.*
THE BOARD OF SUPERVISORS OF THE COUNTY of Trempealeau, respondents.

I, La Fayette Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above-entitled cause. That the original writ of error, the citation with its service endorsed thereon, and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Madison this 2d day of September, A. D. 1874.

[SEAL.] LA F. KELLOGG,
*Clerk Sup. Court Wis.*

(Indorsed:) State of Wisconsin supreme court. The West Wisconsin Railway Company, plaintiff in error, vs. The Board of Supervisors of the County of Trempe'leau, defendant in error. Return to writ of error.

(Indorsement on cover:) No. 499. The West Wisconsin Railway Company vs. The Board of Supervisors of the County of Trempealeau. Wisconsin sup. court. Filed 14th September, 1874.

# Supreme Court of the United States

No. ..... October Term, 1875.

THE WEST WISCONSIN RAILWAY COMPANY,

*Plaintiff in Error,*

*against*

THE BOARD OF SUPERVISORS OF THE COUNTY OF TREMPEALEAU,

*Defendant in Error.*

## BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

P. L. SPOONER,
*Of Counsel.*

Democrat Company, Printers, Madison, Wis.

# Supreme Court of the United States,

THE WEST WISCONSIN RAILWAY COMPANY,
*Plaintiff in Error,*

*vs.*

THE BOARD OF SUPERVISORS OF THE COUNTY OF TREMPEALEAU,
*Defendant in Error.*

In Error to the Supreme Court of the State of Wisconsin.

This action was brought to compel the cancellation of tax certificates upon certain lands in Trempealeau county, upon the ground that the lands were not subject to taxation at the time the tax was levied, and that the certificates were a cloud upon the title of the plaintiff. The lands were declared subject to taxation by acts of the legislature passed in March, 1871, and were sold for the taxes of that year. The plaintiff claimed that the state had entered into a contract by which the lands were to remain free from taxation for a period which had not transpired when the taxes in question were levied, and that the acts subjecting the lands to taxation impaired the obligation of that contract; and upon this point the case turns.

The facts material to the points made in the following brief, are these:

1. Congress, by act approved June 3, 1856, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus to the St. Croix river or lake, and thence to the west end of Lake Superior and to Bayfield, the odd numbered sections of the public lands for six miles in width on each side of said road.

2. By act of April 1, 1863, the legislature incorporated the Tomah and Lake St. Croix Railroad Company (now the West Wisconsin Railway Company,) and conferred upon it the grant made by the act of Congress of June 3, 1856, so far as it was applicable to that part of said road lying between Tomah and Lake St. Croix; the title to 120 sections to vest in the company upon the completion of each twenty continuous miles of said road. Record, p. 21.

3. On the 2d of April, 1864 (no part of said road having at that time been constructed,) the legislature passed an act entitled "an act to aid the Tomah and Lake St. Croix Railroad Company," the first section of which was as follows: "All lands hereafter acquired by the Tomah and Lake St. Croix Railroad Company, of which the title * * * may become vested in said Company * * * pursuant to the act of Congress approved June 3, 1856, and the laws of the state of Wisconsin granting, etc., * * shall be exempt from all taxation for ten years from and after the passage of this act."

The second section of the act, after stating that in case any of said land should be sold, etc., the exemption provided for by the act should no longer apply to them: provided, "that said lands may be *mortgaged for the purpose of raising funds to build such railroad without being subject to taxation for the time aforesaid.*" Record, pp. 32–33.

4. By act approved May 5, 1864 (no part of the road from Tomah to Lake St. Croix having then been constructed,) Congress granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Tomah to the St. Croix River or Lake, the odd numbered sections for *ten* sections in width on each side of said road, deducting the land which had been granted to the state for the same purpose, by the act of June 3, 1856. This act extended the time for the completion of the road to May 5th, 1869.

It provided also that the company should receive patents for the co-terminous lands, not as each twenty consecutive miles were constructed, but only when supplied with all the watering places,

depots, equipments, furniture and all other appurtenances of a first class railroad. It contained also this provision: "That the lands hereby granted *shall, when patented as provided in section seven of this act, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid and no other.*"

5. By resolution of July 13, 1868, Congress extended the time for completing the road to May 5th, 1872.

6. On the 19th of March, 1870, the legislature passed an act entitled "An act to aid the West Wisconsin Railway Company." This act declared "That the time mentioned in the act entitled 'An act to aid the Tomah and Lake St. Croix Railway Company,' approved April 2, 1864, and the acts supplementary thereto in relation to taxing the lands granted by Congress to aid in building the road of said company, be further extended for ten years, for that or any portion of said lands that shall remain unsold by said company * * * * upon the express condition that if the said railroad company shall not have built their said road within *two* years from the passage of this act, then, and in that case, this act shall be null and void: provided, that this act shall not apply to Pierce county. Record, p. 35.

7. In August, 1868, the plaintiff company executed a deed in the nature of a mortgage conveying its road-bed, rolling-stock and all lands it might thereafter acquire, as security for its bonds to the amount of $4,000,000, maturing in 1883, 1885 and 1886. These bonds were executed before any portion of the road was constructed. The road was completed from Tomah to Black River Falls during the fall of 1868. Immediately after the passage of the act of March 16th, 1870, its existence was published abroad as an inducement to the purchase of the company's bonds, and the company constructed 45 miles of the road during that year, and completed the road by November, 1871, incurring large liabilities and making large expenditures in hastening its completion, in reliance upon the provisions of said act. Record, pp. 9–10.

8. In March, 1871, the legislature passed two acts which declared in effect that the lands acquired by the plaintiff company in

Trempealeau county, not used for road-bed or depot purposes, should be liable for taxation. Record, p. 36.

9. The lands mentioned in the complaint are a portion of the lands granted by the act of Congress of June 3, 1856, the title to which had been acquired by the plaintiff in pursuance of the act conferring said land upon it. They had not been sold by the plaintiff, or contracted to be sold, or leased, or improved, and were not used for road-bed or depot purposes. Record, p. 10.

10. The lands referred to were assessed in 1871, for state county and local taxes, and were sold for non-payment thereof, and the certificates of sale are held by the county of Trempealeau. Record, p. 11.

11. The constitution of the state provided that "whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works, and shall devote thereto the avails of such grants." Art. 8, sec. 10.

The constitution also has this provision: "Corporations without banking powers or privileges, may be formed under general laws, but shall not be created by special act, except, etc., * * * All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage." Sec. 1, Art. 11.

13. On the hearing of the cause in the Supreme Court of the State it was claimed on the part of the plaintiff that the act passed in 1871 subjecting the lands in question to taxation, impaired the obligation of contracts created between the state and the plaintiff and the mortgagees of its land, by the acts of April 2d, 1864 and of March 16th, 1870, and by the action of the plaintiff and said mortgagees thereunder; and that it impaired the obligation of the contract created by the acts of Congress of June 3, 1856, and May 5, 1864, and the acts of the legislature accepting the grants thereby made, and by section 1, Art. 11 of the constitution of the state. Record, pp. 19–20.

The Supreme Court adjudged otherwise and dismissed the plaintiff's complaint.

POINTS AND AUTHORITIES.

1. The provisions of the act of April 2d, 1864, that the lands to be acquired by the railroad company might be mortgaged for the purpose of raising funds to build the road, without being subject to taxation for ten years after the passage of the act, became, when acted upon, a contract between the state and the mortgagees, which the state could not annul by virtue of what is called the reserved power.

*Woodruff v. Trapnall*, 10 How., 190.
*Curran v. State of Arkansas*, 15 How., 304.

In the case first cited, it was held that a provision in the charter of a bank, that its bills should be received in payment of debts due to the state, was a contract on the part of the state with the holders of the bills, and that a subsequent act repealing the provision was void as impairing the obligation of the contract.

In the other case, it was held that a clause in the charter of a bank giving assurance that certain funds (deposited therein) should be devoted to the payment of its debts, constituted a contract between the state and the creditors of the bank, and that an act of the legislature diverting the funds to another purpose impaired the obligation of the contract and was void.

In each of these cases the state was the sole stockholder in the bank, and the charter was therefore not such a contract between the state and the corporation as was protected by the constitution of the United States, and the decisions rest upon the ground that where a charter holds out assurances to third persons upon which they are invited to give credit to the corporation, such assurances, when accepted and acted upon, become a contract, the obligation of which is protected by the constitution. The same principle is recognized in *Barings v. Dabney*, 19 Wall. 1.

The provision referred to in the act of April 2d, 1864, was an assurance held out by the state to every one who would loan the company money for the construction of its road, upon a mortgage of the lands to be acquired by such construction, that the lands

should remain free from taxation for the time specified in the act; and when third persons had acted upon that assurance, and parted with their money on the faith of it, the transaction had all the elements of a binding contract, and the state could not subject the lands to taxation within the time specified, without impairing its obligation. It was the lands, with the immunity from taxation for the given time, that the mortgagees agreed to accept as security for their money.

The decision of the Supreme Court of Wisconsin, that the state might subject the lands to taxation before the expiration of the specified period of exemption, was made to rest principally upon the case of Tomlinson v. Jessup, 15 Wall., 454. In that case the provision that the railroad company should hold its property exempt from taxation, had no other consideration than that which grows out of the grant and the acceptance of a charter, or the offering and acceptance of an amendment to a charter. It was to avoid the obligation of such a contract, that the power of alteration or repeal was reserved. If a right to revoke the exemption in the case just cited, did not exist, the reserved power would amount to nothing, for the company held every franchise it possessed, by just the same tenure as it held the privilege of exemption from taxation. The state in that case had not held out assurances to third persons, that upon their giving credit to the corporation or buying its stock, the exemption from taxes should continue for any definite time. The charter was a contract between the state and the corporation only, by the terms of which the privilege of exemption was subject to revocation at the pleasure of the legislature. Persons who afterwards purchased the stock of the company, had no right to assume that the privilege would not be revoked. The state had entered into no contract with them, and they took their interests with knowledge of the reserved right and of the possibility of its exercise. There is nothing in *Tomlinson v. Jessup* which is in conflict with *Woodruff v. Trapnall* or *Curran v. The State of Arkansas.* The provision in the act of April 2d, 1864, that the lands might be mortgaged without being subject to taxation for ten years, was made for the very pur-

pose of inducing third persons to loan their money in reliance upon it; and when they had done so, the matter no longer rested upon a revocable authority, but became a binding contract whose obligation the state could not impair. The closing sentences of the opinion in *Tomlinson v. Jessup* seem sufficient to guard against error upon this point. "The reservation affects the entire relation between the state and the corporation, and places under legislative control, all rights, privileges and immunities derived by its charter directly from the state, Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The state only asserts, in the present case, the power, under the reservation, to modify its own contract with the *corporators;* it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

2. The provision that the lands might be mortgaged without being subject to taxation for the time specified, became, when acted upon, a binding contract with the *company* as well as with the mortgagees.

*Non constat* that the company would have mortgaged its lands had it not been for the agreement that they should not be subject to taxation for the period mentioned. It seems impossible to distinguish between the contract made by the state with the mortgagees and that made by the state with the company, in regard to the exemption, so as to hold the former to be inviolable and the latter subject to be annulled at the pleasure of the state. The lands could not be exempt from taxation as far as the mortgagees were concerned, and subject to taxation so far as the company was concerned. If the contract was inviolable as between the state and the mortgagees, the land was not subject to taxation; the tax sales were invalid; and the company had a right to enjoin the ssuing of tax deeds. The state stands in the position of one who

holds a first mortgage upon land and agrees to remit the interest on his debt for a limited time if the mortgagor will raise money upon a second mortgage for the purpose of making improvements which will render the first mortgage a more valuable security. In such case the mortgagor might resist the collection of the interest which the first mortgagee had agreed to forego, whether the second mortgagee complained of it or did not. In the present case the mortgage or trust deed covers not only the lands of the company but its road-bed and rolling stock, and if the lands are taken for the non-payment of taxes, the mortgage debt will be thrown wholly upon the other property of the company.

3. The act of March 16, 1870, declaring that the time of exemption of the lands of the company from taxation, should be further extended for ten years, on condition that the road should be built within two years from its passage, became, upon performance of the condition, a contract which could not be annulled by the legislature under its reserved power.

*Montgomery v. Kasson*, 16 Cal. 189.
*McGee v. Mathis*, 4 Wall. 143.
*State of Ark. v. County Court of Crittenden Co.*, 19 Ark. 365.

At the time of the passage of this act miles of the road remained to be constructed. The grant would lapse if the road should not be completed by May 5th, 1872. No time was fixed by law for the completion of the road. The record gives reason to believe, that the road could not have been finished within two years from the passage of that act, unless a large amount of the mortgage bonds of the company could be sold; and that the bonds could not have been sold, if the lands were to become taxable as soon as they were earned. In this condition of things the state proposed to the company that the lands acquired by the construction of the road should be free from taxation for the further period of ten years (unless sooner sold) upon the express condition

that the company would finish the road within two years. The increase of taxable values along the line of the road and the revenue to be derived from a tax on the receipts of the company, were an ample consideration to the state for the taxes which it agreed to forego. The company gave a consideration for the exemption when it forced its bonds upon the market at a large discount, and completed the road within two years from the passage of the act.

The state court held that the act under consideration and the action of the company under it, created a contract between the state and the company, but they held also that the exemption, "although constituting a part of the contract," might be revoked after performance of the condition, whenever, in the judgment of the legislature, the public interest should demand its revocation. The state court was pressed with the question whether the contract that the company should have the land grant upon the terms mentioned in the charter, was not protected by the constitution of the United States; and they answered "It may be conceded that the legislature, under the power of revocation, could not divest the company of its title to the land after it was earned, nor take away its property which it had acquired. The property of the corporation, for all moral purposes, stands upon the same ground as the property of an individual, and is equally protected by the constitution." The promise to exempt the lands from taxation for a given time, was, in form and substance, as much a part of the contract between the state and the company, as was the promise that the company should have the lands upon the terms mentioned in the charter. In regard to each of the promises the consideration which the state received, was actual and substantial. It is true, the state need not have made the promise to exempt the lands from taxation; nor need it have made the promise to transfer the lands to the company upon the terms mentioned in the charter. The act under consideration was not, in any proper sense, an alteration of the charter of the company, but if it be regarded as such, the question seems to be nothing more than this: If the legislature of Wisconsin incorporates a company to construct a rail-

road, and declares, in the charter, that as the work progresses the company shall receive certain lands, and may hold them exempt from taxation for a given time, can it, after the work had been done and the lands conveyed to the company, annul the contract so far as it relates to the exemption from taxation? We admit that under the constitution of Wisconsin no irrepealable or unalterable franchise can be granted to a corporation. The *right* to build the road, and to receive, as compensation, the lands with the proposed immunity from taxation, was a franchise which might have been altered or taken away by the legislature. But there is a clear distinction between a franchise and property rights which have been acquired by the lawful exercise of the franchise. If the state permits a franchise to continue until by its lawful exercise the corporation has acquired a vested right to property, no alteration or repeal of the charter can take away that right. *Miller v. The State*, 15 Wall., 480; *Holyoke Company v. Lyman*, id., 500, 519; *Commonwealth v. Essex Company*, 15 Gray, 253. It seems necessarily to follow that if the state could not annul its contract to convey the lands to the company, it could not annul the agreement in regard to the exemption of the lands from taxation. It was the land with that quality of exemption which formed the price the state was to pay for the construction of the work, and the right to the exemption rests upon the same foundation as the right to the land itself. In *McGee v. Mathis*, *supra*, where the contract of the state was to convey land for certain scrip, and to refrain from taxing the lands for a time specified, the court, speaking of the scrip, and the act subjecting the lands to taxation, say: "But the exemption of the lands for which it was receivable, from taxation, was a principal element in its value. This was clearly an impairment of the contract. The state could no more change the terms of the contract by changing the stipulated character of the lands to be conveyed in satisfaction of the scrip, as to liability to taxation, than it could abrogate the contract altogether, by refusing to receive the scrip at all in payment for land."

In *State of Arkansas v. County Court of Crittenden County*, 19 Ark., 360, the court, speaking of the scrip above referred to, and

of the law under which it was issued, say: "Persons relying on the good faith of the state, purchased the bonds upon the terms proposed. Now what did they get as a consideration for their money or labor? Did they get lands merely? The answer is obvious: they not only got lands, but, with them the solemn undertaking of the state, that they should be exempt from taxation for the period specified in the act."

4. The act passed in 1871, declaring the lands in question subject to taxation, impaired the obligation of a contract created by the acts of Congress of June 3, 1856, and May 5, 1864, and the acts accepting the grants thereby made, and by section 10 of Art. 8 of the Constitution of the state.

Upon this point nothing need be added to the argument presented by the attorney of the railroad company in his printed brief on file in this case.

P. L. SPOONER,
*Of counsel for Plaintiff in Error.*

# SUPREME COURT

OF THE

# UNITED STATES.

No. October Term, 1875.

THE WEST WISCONSIN RAILWAY COMPANY,

*Plaintiff in Error,*

*against*

THE BOARD OF SUPERVISORS OF THE COUNTY OF TREMPEALEAU,

*Defendant in Error.*

## Brief and Argument for Plaintiff in Error.

*JOHN C. SPOONER,*
*Of Counsel.*

Atwood & Culver, Printers and Stereotypers, Madison, Wis.

# SUPREME COURT

OF THE

# UNITED STATES.

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THE WEST WISCONSIN RAILWAY COMPANY,

*Plaintiff in Error,*

*against*

THE BOARD OF SUPERVISORS OF THE COUNTY OF TREMPEALEAU,

*Defendant in Error.*

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IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

## STATEMENT.

This action was brought to compel the cancellation of certain tax certificates upon lands in Trempealeau county, upon the ground that the lands were not subject to taxation at the time the tax was levied, and that the certificates were a cloud upon the title of the plaintiff.

The lands were sold for the taxes of 1871, and the only question in the case is whether they were or were not subject to taxation at that time.

The facts, out of which the question arises, are these:

1. Congress, by act approved June 3, 1856, granted to the state of Wisconsin to aid in the construction of a railroad from Madison or Columbus to the Saint Croix river or lake, and thence to the west end of Lake Superior and to Bayfield, and also of a railroad from Fond du Lac, on Lake Winnebago, northerly to the state line, every alternate section of public land designated by odd numbers for six sections in width on each side of said roads.

11 Stat. at Large, 20.

The act provided that the lands should be exclusively applied to the roads for which they were granted, and should be disposed of only as the work progressed, except that the state might sell one hundred and twenty sections in advance of construction. It also provided that if the roads were not completed within ten years all sales should cease, and the lands unsold should revert to the United States.

2. The state accepted the grant by act of October 8, 1856.

Record, page 32.

[The grant in aid of the road from Madison or Columbus to Superior and Bayfield was conferred by act of October 12, 1856, upon the La Crosse and Milwaukee Railroad Company.]

3. By act of April 1, 1863, the plaintiff in error was incorporated under the name of "Tomah and Lake St. Croix Railroad Company," and by section five was authorized to construct a railroad from Tomah (a point on the located line of the land grant road to which the La Crosse and Milwaukee Company had built) to the Saint Croix river or lake; and by section nine so much of the grant of June 3, 1856, as was applicable to the construction of the road between Tomah and Lake St. Croix was conferred upon this company.

Record, page 21.

Section nine authorized the company to borrow money upon its bonds, and to execute a mortgage or deed of trust upon its railroad, constructed, or authorized to be constructed, and

"all of its estate, real, personal or mixed, in possession or expectancy * * acquired or to be * acquired;" and to prescribe by resolution all matters relating to the terms of any such mortgage or deed of trust.

Record, pp. 25–6.

Section fourteen contained a proviso that the company should not, for the purpose of aiding in the construction of its road, encumber any of the lands to which it would be entitled by the construction of the road, and that the road should be completed on or before June 3, 1866.

4. April 2, 1864, the legislature passed an act entitled "an act to aid the Tomah and Lake St. Croix Railroad Company," the first section of which, omitting superfluous words, was as follows: "All lands hereafter acquired by the Tomah and Lake St. Croix Railroad Company, of which the title * * may become vested in said company * * pursuant to the act of Congress * * approved June 3, 1856, and the laws of the state of Wisconsin, granting, etc., * * shall be exempt from all taxation for ten years from and after the passage of this act."

The second section of the act is as follows: "In case any such lands shall be sold, contracted to be sold, leased or conveyed by said company * * then such lands shall become subject to taxation immediately, and the exemption provided for by this act shall no longer apply to such lands; *provided, the said lands may be mortgaged for the purpose of raising funds to build said railroad without being subject to taxation for the time aforesaid.*"

5. The act of congress approved May 5, 1864, by its 2d section, granted to the state for the purpose of aiding in the construction of the railroad from Tomah to the St. Croix River or Lake, every alternate section for ten sections in width on each side of said road, "deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose by the act of congress, * * * approved June

three, eighteen hundred and fifty-six, upon the same terms and condition as are contained in said act. * * *

13 Stat. at Large, p. 66.

The first section was the same, save that it applied only to the road from St. Croix to the west end of Lake Superior and provided for a branch road to Bayfield.

The 7th section, unlike the act of June 3, 1856, provides, not simply that the *state* may sell the given number of sections upon the mere completion of twenty miles of road, but "that whenever the *companies* to which this grant is made or to which the same may be transferred shall have completed twenty consecutive miles of any portion of said railroads, supplied [with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first class railroad, *patents* shall issue conveying the right and title to said lands to the said company entitled thereto on each side of the road, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed." The remainder of the section indicates the proof of completion and equipment which shall be furnished to the Secretary of the Interior before any patents issue.

Section 8 is as follows: "That the lands hereby granted shall *when patented*, as provided in section seven of this act, *be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid and no other.*" * * *

The act extended the time for the construction of the road from Tomah to the St. Croix Lake until May 5, 1869.

6. The legislature, by joint resolution, approved March 20, 1865, accepted the grant, and agreed "to execute the said trust created by the aforesaid act of congress pursuant in all things to the terms, limitations and conditions of said act."

Record, page 37.

7. By act of March 29, 1865, the legislature confirmed to

the railroad company the grant theretofore made to it of lands embraced in the grant of June 3, 1856, and conferred upon it all the lands granted by the act of congress, approved May 5, 1864, applicable to the construction of its road, and enacted further that the lands which the company might acquire under the grant of May 5, 1864, should "only be subject to the same rule, extent and mode of taxation" provided for by the act of April 2, 1864, as to the lands which the company might acquire under the act of June 3, 1856.

Record, page 33.

8. The legislature by act of April 6, 1866, struck out the proviso to section 14 of the charter, which prohibited the company from encumbering its lands before they were acquired and fixed a time for the completion of the road.

Record, page 34.

9. In June, 1867, the name of the plaintiff was changed from the Tomah and Lake St. Croix Railroad Company to the "West Wisconsin Railway Company."

Record, page 9.

10. On the 9th of April, 1866, an act was passed, entitled "An act to *extend* the time exempting certain lands from taxation."

This act declared that all the lands granted by the act of congress, approved June 3, 1856, and the acts amendatory thereof were thereby "exempt from taxation and from assessments of any kind up to the 3d day of June, 1861, *the time limited by congress for the completion of the roads, and carrying out the terms of the grant having been extended to that date;* provided that such lands or any part thereof shall not be exempt from taxation from and after the time the same shall be sold, contracted to be sold, leased or in any manner conveyed by any railroad company." [This act is not supposed by counsel for plaintiff in error to have any bearing upon the case, but counsel for defendant made some point upon it in the court below.]

11. By joint resolution, approved July 13, 1868, congress extended to the West Wisconsin Railway Company the time as fixed by the act of May 5, 1864, for the completion of its railroad from Tomah to the Saint Croix Lake, three years, to wit, until May 5, 1872, upon condition that the road should be completed from Tomah to Black River Falls within one year from the passage of said resolution.

15 Stat. at Large, p. 257.

The condition was performed.

Record, page 10.

12. On the 28th day of August, 1868, the plaintiff executed a deed in the nature of a mortgage, by the terms of which the road bed, rolling stock, and all lands thereafter to be acquired from the state of Wisconsin or the United States, were as security for certain bonds to be issued by the plaintiff, conveyed to trustees, with the provision, among other things, that the lands should be released from time to time for sale by said company, *and that the avails of said lands, when sold, should be paid direct to such trustee, to be applied to the payment of such bonds.* The amount of bonds secured by said deed of trust was four million dollars, and the bonds were known as the plaintiff's land grant bonds — they were executed before any portion of the road was constructed, and before the plaintiff acquired title to any of the lands granted to aid in its construction. The bonds run fifteen years from the date thereof, bearing interest at ten per cent. per annum in gold, payable semi-annually. They were issued in series, the first series being issued in 1868, and the remaining in 1870, 1871 and 1872. None of them mature before the year 1882, and by far the greater portion of them do not mature before 1885 and 1886. The company realized from the sale of the $4,000,000 of land grant bonds about $3,200,000, and devoted it to construction and equipment of the road, for which purpose it was inadequate.

Record, page 9.

13. On the 16th of March, 1870, an act was passed by the legislature, entitled "An act to aid the West Wisconsin Railway Company."

The act declared "That the time mentioned in the act * *, approved April 2, 1864, and the acts supplementary thereto, in relation to taxing the lands granted by congress to aid in building the road of said company be *further extended for ten years*, for that or any portion of said lands that shall remain unsold by said company," but in case any of said lands shall be sold, contracted to be sold, or leased, the "purchasers" shall not receive any benefit from such extension.

Section 2, after making it the duty of the company to furnish a list of the lands sold, contracted to be sold or leased, that they might be assessed, etc., concluded as follows: "*And it is further provided, and this act is upon the express condition that if the said railway company shall not have built their said road within two years from the passage of this act, then and in that case this act shall be null and void.*" * *

Record, page 25.

14. Immediately after the passage of the last mentioned act, the fact of its existence was published extensively in the United States and abroad, as an inducement to the purchase of said bonds. It was likewise so published by the company during the year 1871. In 1870, after the passage of the act, the company sold about $800,000 of its bonds.

15. Immediately after the passage of the said act of 1870, the company proceeded with the construction of its road, and during the year 1870 constructed forty-five miles or more, and continuously proceeded with diligence in its construction, and completed the same during the month of November, 1871; the plaintiff, in reliance upon the provisions of said act and on the strength thereof, incurring *large liabilities* and making *large expenditures of money* in *hastening the completion* of said road pursuant to the provisions of said act.

Record, page 10.

16. As soon as practicable after the plaintiff acquired title to the lands, they were put in the market, and have since been sold as rapidly as possible. The avails of the lands already sold amount to only $100,000, which have been applied toward the payment of said bonds. There was a large deficiency in the grant — about 293,000 acres, and a large portion of the lands acquired are comparatively worthless, and the strong probability is that the avails of the lands will not be sufficient to pay the bonds.

Record, page 10.

17. By act published March 22, 1871 (which became a law without the approval of the governor,) it was enacted that all lands in Trempealeau county owned by any railroad company, not used for road bed or depot purposes should be liable to taxation the same as other real estate.

By act approved March 24, 1871, the same end was sought to be accomplished by amending the act of March 16, 1870, by providing that the act should not apply to Trempealeau county.

Record, page 36.

18. The lands mentioned in the complaint were, during the year 1871, held by plaintiff in error under patent from the state of Wisconsin, and are a portion of the lands granted to the state by act of June 3, 1856, and have not been sold by the plaintiff, nor contracted to be sold, or leased, or improved, and are not used by the plaintiff for road bed or depot purposes.

19. The lands described in the complaint were, during the year 1871, assessed in the county of Trempealeau, for state, county and local taxes, and were on the 15th day of May 1872, sold for nonpayment of said taxes, and were bid in by the county of Trempealeau, which now holds the certificates of such sale.

20. Section 10 of article VIII of the state constitution provides that:

"* * * Whenever grants of lands or other property shall have been made to the state especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works, and *shall devote thereto the avails of such grants* and may pledge or appropriate the revenues derived from such works in aid of their completion."

21. Section 1 of article XI of the constitution is as follows:

"Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

22. On the hearing in the supreme court the plaintiff claimed that the acts passed in 1871, subjecting to taxation the lands in question, impaired the obligation of the contract created between the United States and the state by the acts of congress making the grants, and by the acts accepting the same, and by section 10 of article VIII of the constitution of the state, but the court adjudged otherwise.

The plaintiff also claimed that by section 1 of the act of April 2, 1864, and by the action of the railroad company thereunder in constructing the road and thereby acquiring title to the lands, a contract was made between the state and the company, that the lands so acquired should be exempt from all taxation for ten years after the passage of said act, unless sooner sold, contracted to be sold, leased or conveyed by the company; and that by section two of said act and the action of the company thereunder in mortgaging its lands for the purpose of raising funds to build said road, a contract was created between the state and the mortgagees of the lands and the company, that the lands mortgaged should not be subject to taxation for ten years after the passage of said act; and

also that by the act of March 16, 1870, and the action of the railway company thereunder, and especially by its completion of said road within two years after the passage of said act, a contract was created between the state and the railway company, that the lands granted by congress to aid in building said road, or so much thereof as should remain unsold by said company, should continue exempt from taxation for the further period of ten years in that act mentioned; wherefore the plaintiff claimed that the acts passed in 1871, declaring said lands liable to taxation, impaired the obligation of the several contracts so entered into between said state and said railway company and said mortgagees, and were therefore repugnant to the constitution of the United States; but the court adjudged "that the several contracts so made between the state and the appellant or the mortgagees of its lands by the said several acts of the legislature and by the action of the appellant or said mortgagees thereunder, were respectively made with reference to section 1 of article XI of the constitution of the state, which entered into and formed a part of such contracts; and that the said acts passed in 1871 did "therefore not impair the obligation of any contract entered into between the state and the company or the mortgagees of its lands and were not repugnant to the constitution of the United States. The court therefore held that the complaint of the plaintiff was properly dismissed, upon the ground that the lands in question became subject to taxation by virtue of the acts passed in 1871.

Record, pages 19–20.

## ERRORS ASSIGNED.

We insist that the state court erred:

1. In holding that the acts passed in 1871 subjecting to taxation the lands in question did not impair the obligation of the contract created between the United States and the state, by

the acts making the grant and by the acts accepting the same, and by section 10 of article VIII of the state constitution.

2. In holding that the acts subjecting to taxation the lands in question did not impair the obligation of the contract entered into by the state with the plaintiff by the acts of the legislature conferring the lands upon it, and its acceptance thereof, and section 10 of article VIII of the state constitution.

3. In holding that said acts passed in 1871 were not void as impairing the obligation of a contract made between the state and the plaintiff in error by section 1 of the act of April 2, 1864, and the action of the plaintiff under said section.

4. In holding that said acts were not void as impairing the obligation of a contract created between the state and the plaintiff by section two of the act of April 2, 1864, and the action of the company thereunder in mortgaging its lands to raise funds to build its road.

5. In holding that said acts were not void as impairing the obligation of a contract created between the state and said mortgagees by section 2 of said act of April 2, 1864, and the action of said mortgagees under said section in loaning money to build said road.

6. In holding that said acts were not void as impairing the obligation of the contract created between the state and the plaintiff by the said act of March 16, 1870, and the action of the plaintiff thereunder.

7. In holding that the several contracts so made between the state and the plaintiff by the said several acts of the legislature and by the action of the plaintiff and said mortgagees thereunder were subject to be annulled by the legislature at any time under section 1 of article XI of the constitution of the state, and that said acts passed in 1871 did therefore not impair the obligation of said contract.

8. In holding that the lands described in the complaint were subject to taxation in the year 1871.

9. In affirming for that reason the judgment of the circuit court dismissing the plaintiff's complaint.

## ARGUMENT.

### I.

*The taxation by the state of the lands in question was unauthorized because in violation of the trusts created by the acts of congress making the grants, and the acts of the legislature accepting them, and expressly undertaking the trusts thereby created.*

In submitting this proposition we are not unmindful of the decision of this court, filed at October term, 1874, in the case of *Tucker et al. v. Ferguson et al.* (Unreported.)

The grant to Michigan under consideration in that case was approved the same day as the first grant to Wisconsin involved here, and the language and terms of the two are identical. If the proposition above stated rested alone on the grant of June 3, 1856, it would, in view of the decision in the case just cited, doubtless be improper to urge it in the case at bar. But it does not.

Referring to the attitude of the state of Michigan in accepting that grant, and to her liabilities and duties thereunder, the court say: "The state accepted the grant, subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might all have been discharged by private individuals. The character of sovereign and trustee were united in the same party. The state did not in anywise abdicate her sovereignty by accepting the trust, but the *former* might be exercised to render *more effectual* the discharge of the *latter*. She was in no wise fettered, *except as she agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be ultra vires, and cannot be supported.*"

The law thus stated compels assent. What then were the "terms and conditions which accompanied the grants" to Wisconsin, and which she bound herself to fulfill?

The answer to this question involves a somewhat careful examination and comparison of the acts of June 3, 1856, and May 5, 1864.

11 Stat. at Large, p. 20.

13 Stat. at Large, p. 66,

The first act made, so far as we have to do with it in this case, a grant of six sections per mile, to aid in the construction of one road from Madison or Columbus to the Saint Croix lake, thence to the west end of Lake Superior and to Bayfield. It provided that the land should be exclusively applied to that road, and should be disposed of only as the work progressed. It also contained the usual provision that the land should be subject to the disposal of the legislature "for the purposes aforesaid, and no other." It further limited the power of disposal by providing that, except as to one hundred and twenty sections, which the state was authorized to sell in advance, the land should be disposed of only upon the completion of sections of road not less than twenty continuous miles each in length.

The grant was duly accepted by the legislature in October, 1856.

It may well be said under this act, that as fast as the company selected by the state to execute the trust had constructed road and acquired the lands applicable thereto, the state had *applied* the lands to the specific improvement in aid of which they were granted, and had *pro tanto* executed the trust.

It will be noticed that *this act deals only with the state.* There is nothing in the language employed which indicates an intention on the part of congress to impress upon the lands any trust after they were conveyed by the state upon the construction of the given miles of road.

But how is it with the act of May 5, 1864, in this regard?

In aid of the construction of the road from Tomah to the Saint Croix lake, the second section of the act granted every alternate section of public land, designated by odd numbers, for *ten* sections in width on each side of the road, *deducting* therefrom the lands granted by act of June 3, 1856, and upon the same terms and conditions as contained in the latter act. (Other grants were made with which we have here no concern.)

Section seven is, as remarked in the statement of facts, essentially different from the kindred section of the act of 1856. The latter provided for the sale by the state of land upon the *completion* of any twenty continuous miles of road, etc.

This section provides that "whenever the *companies* to which this grant is made, or to which the same may be transferred, shall have completed any twenty consecutive miles of any portion of said railroad supplied *with all necessary drains*, * * *depots, equipments, furniture, and all other appurtenances of a first-class railroad*, patents shall issue conveying the right and title to said lands to the said company entitled thereto. * *"

The two acts being *in pari materia*, are to be construed together, and, reading them together, it is apparent that the one is a revision of, and a substitute in many respects for, the other.

The act made by its first and second sections separate and independent grants in aid of *two* roads, *treated as distinct*, *both* of which constituted but *one* road under the act of June 3, 1856. So distinct were they made that, while under the earlier act the Lake St. Croix terminus of both must have been the same—it being a continuous road from Madison or Columbus, etc., to Lake Superior—under the later act, the Lake St. Croix terminus of the one might be thirty-six miles from that of the other.

The act of May 5, 1864, granted ten sections on each side of the road. But as the act of 1856 had granted six sections in aid of the same road, in order to prevent the two from be-

ing construed as a grant of *sixteen* sections per mile, the six sections granted by the latter were deducted. It seems quite clear that the conditions and restrictions indicated in the act of May 5, 1864, were intended to apply equally to the lands referred to as having been embraced in the act of June 3, 1856. Manifestly, none of the lands granted by the act of 1856 could be acquired except upon performance of the precedent conditions of the act of 1864—until the road was constructed and equipped *in the manner required in the latter act.* Both grants being in aid of the same road, congress certainly did not intend that a portion of the lands should be acquired under the provisions of the act of 1856, and a portion under the changed and added restrictions of the act of 1864. While the act of 1856 is silent as to *companies* and as to *patents*, the act of 1864 is express as to both. While the act of 1856 is silent as to the coterminous principle, the act of 1864 is explicit upon it. We think it clear that the conditions and restrictions of the act of 1864 abrogated those contained in the act of 1856, so far as inconsistent therewith, and *applied to the whole ten sections granted by both acts.*

It will be borne in mind that at the time the later act was passed, about eight years had elapsed and no portion of the road from Tomah to the Saint Croix Lake had been constructed. No rights had vested, thererefore, in any corporation prior to May 5, 1864, in this portion of the grant. It was then competent for congress, with the consent of the state, to revoke the grant, or to add to it, with new conditions and restrictions applicable to the whole, and the state could lawfully consent to such modification. The state did so consent by accepting the grant of May 5, 1864.

This brings us to the peculiar provision of the act of May 5, 1864, which distinguishes this grant from that involved in *Tucker v. Ferguson, supra*, and upon which we mainly rest the proposition for which we are contending. It is as follows:

"Section 8. *That the lands hereby granted shall, when patent-*

*ed, as provided in section seven of this act* (i. e., to the companies, upon proof of the completion and equipment of the road), *be subject to the disposal of the companies respectively entitled thereto for the purposes aforesaid, and no other.*"

No such language is to be found in the act of June 3, 1856, or in that involved in the Tucker case.

Forming, as it does, a separate and independent section of the act, force and effect for some purpose must, we take it, be given to its language. If the act *proprio vigore* vested in the railway companies the legal title upon condition subsequent, the office and object of the section would perhaps be more easily discernible. It would, in such case, be manifestly intended to protect the estate from misapplication or diversion by the companies having the *legal title.* But the act was a grant to the *State in presenti.* It passed a title to the odd sections designated, to be afterwards located. When the line of the road was fixed, and the location of the odd sections thus became certain, the title of the state acquired precision and at once attached to the grant. The state then held the legal title upon condition subsequent.

*Schulenberg v. Harriman*, 21 Wallace, 59.

Obviously, no railroad company obtained or could obtain, from the act of congress *alone*, the right to perform the conditions and acquire title to the lands. The act evidently recognized the policy of the state, apparent from her legislation from the time the first grant was made, to select railway companies as her agents or instruments, to construct the roads and generally to execute the trusts. It therefore, while making the grant to the *state*, contemplated the transfer of the same by the state to *companies*, and provided what the *companies* should do, before the issue of patents to them.

There can be no question that, under the act of May 5, the completion of the road in sections of not less than twenty consecutive miles each and its equipment were conditions pre-

cedent to the conveyance by patent of any of the lands to the company entrusted with the construction.

This court has so held as to this very grant.

*Schulenburg v. Harriman, supra.*

This being true, it of necessity follows that, *before* any company to which the state had given the *right to acquire the lands* (which was all she could, in the first instance, give), could obtain a patent therefor, the *money necessary for construction and equipment* must not only be *raised*, but *expended* in such construction and equipment.

We assert it to be absolutely impossible to give any effect whatever to section eight, and at the same time to declare that as fast as lands were patented to the railway companies upon the construction of sections of road, the *trust as to the lands* was *pro tanto* executed.

If such was the intention of congress, why provide that the *lands when patented to the companies* respectively entitled thereto, *shall be subject* to *their disposal for the purposes aforesaid and no other*?

The supreme court of Wisconsin say: "It seems to us that when the lands were earned by the company, they became its property, and like the property of individuals were subject to taxation. * * As fast as the company acquired the title by the construction of the road, the trust was *pro tanto* executed."

If this be true, pray tell us upon what theory congress placed an independent section in the act *limiting the power of disposal by the companies after patent?* This view of the state court strips the language of section 8 of all meaning, force or effect. It either practically expunges it from the act, or convicts congress of the gross absurdity of attempting to limit and hamper the companies in disposing of lands which had become their private property, *freed absolutely from trusts* of *any* kind. This is certainly inadmissible.

It will be noticed that the limitation here imposed upon the

companies is precisely the same as that imposed upon the state in the act of June 3, 1856, and in the Michigan act in *Tucker v. Ferguson.* It placed upon the lands *when patented to the companies* precisely the same trust upon which they were held *by the state* under the act of 1856. The companies would hold the legal title *just as the state held it, upon an express trust.* And we submit that this was a wise provision upon the part of congress, and a marked improvement upon the land grant acts passed in 1856, and about that time. Under the act of June 3, 1856, when twenty miles of road were built, and the lands applicable to the same *were conveyed to the company*, they became *private property.* The limitation being upon the state, not upon the company, no trust would follow them into the hands of the latter. If the company failed to build more road, the *lands were gone.* No other company would ordinarily build from the end of a little piece of road owned by some one else. The best lands could thus be acquired, and still *the road* which congress desired would not be built. Of course the lands unsold by the state, that is those not conveyed to companies on the construction of road, would revert to the United States.

In a case which recently came before this court, under a grant to Iowa like [this grant of 1856, the court] was compelled to hold that one hundred and twenty sections had become irrevocably aliened and *no road whatever completed.*

*Railroad Co. v. Courtwright*, 21 Wallace, 210.

We suppose it was to guard against such results that congress placed in the act of May 5, 1864, this section 8.

Under it if the company acquired patents for two hundred sections of land or four hundred sections, upon the construction of road, and failed to build and equip the next section of road, within the time limited by the state, and the state did not think proper to waive the forfeiture, we think she could, and as a vigilant trustee should, compel the application of the avails of the land *through another company*, to the purposes of

the trust. It seems certain that the power would be lodged somewhere to enforce the trust impressed upon lands thus patented to the company, and it is immaterial to our argument whether it would be for the state or the United States to thus enforce the execution of the trust.

*So far from being the absolute property of the company freed from trust* would these lands be.

We are certainly right in saying that this section clearly distinguishes this case from *Tucker v. Ferguson*, and from *Bur. & Miss. R. R. Co. Hayne*, 19 Iowa, 137, referred to in the Tucker case. The grant in the case in 19 Iowa was the same as the Michgan grant, and as our grant of 1856, and the court held the lands taxable before sale by the company upon the express ground that when acquired they were free from trust, and were "theirs to use, to sell, to control and to enjoy in all the methods in which individuals may use their property."

We insist, then, *that this section clearly evinces an intention upon the part of congress that a trust shall follow the lands into the hands of the company.*

Now what is the nature and extent of this trust? Literally, to dispose of the lands for the "purposes aforesaid and no other." The act of congress recognized what is of necessity a fact, that the road would be built in sections or divisions. For the purposes of acquiring lands the act requires the sections to be each twenty consecutive miles in length. First, then, antecedent to acquiring an acre of the land, twenty consecutive miles must be completed and equipped as required by section seven. This done, the company would be entitled to receive a patent for the first two hundred sections of land. The land thus patented is, however, impressed with a trust. The company's power of disposal is limited. It can dispose of it "for the purpose aforesaid and no other." What *is* the "purpose aforesaid," as applied to the section of completed road and the lands patented thereupon? As the lands could not be patented until *after* the twenty miles were *completed* and *equipped*, it is

obvious that they could not be disposed of for such construction except indirectly by way of mortgage in expectancy. The money necessary for the completion of the section of the road might thus be raised, using the lands thereafter to be acquired as a mere *means of credit.* This being done the only possible way in which the lands thus earned could be in any sense used for the *construction* of the first twenty miles of road, would be by selling them when earned and applying the avails to the repayment of the money thus obtained for construction.

If this interpretation be considered forced and unnatural, there is one which gives effect to the language, and, is moreover, natural. It is this : that the lands patented to the company upon the completion of the first section of road, were to be disposed of for the purpose of completing in accordance with the requirement of section 7, the next twenty miles and so on. Under this construction the lands acquired for the completion of the first twenty miles must be devoted *solely to the construct on and equipment of the remainder of the road,* and the section means at least this, if it means anything. So that the execution of this trust, *plainly* created by section seven, involves the application by the company of the avails of the lands thus *patented* for the first section of road, *either to replacing the money actually expended in construction, or in constructing and equipping the succeeding section or sections, or to both purposes.* Can there be any question, that by accepting the grant and consenting "to execute the trust created by said act of congress pursuant in *all things to the terms, limitations and conditions of said act*" (Record, page 37), the State of Wisconsin solemnly agreed, as trustee, that the lands so granted should be "subject to the disposal of the companies, respectively, entitled thereto for the purposes aforesaid, and not other?" Certainly not.

Can it be successfully contended that the two hundred sections patented upon the completion of the first section of road could be immediately subjected to taxation?

In *Tucker v. Ferguson*, supra, this court says: "Upon general principles *she could not tax the land* while the title remained in the United States, *nor while she held them as trusteee of the United States, which, in view of the law, was the same thing.*"

This settles the proposition that taxation of the lands by the state *before* conveyance to the railway company would have been invalid, as being inconsistent with the trust upon which she held them. We have already shown, that section 8, of the act of May 5, 1864, contained the same limitation upon the power of disposal by the *company after* patent, that the act of June 3, 1856, and the Michigan act imposed upon the *state*, except as to the 120 sections which might be sold in advance, and it seems to us clear, beyond doubt, that the *company* would hold the lands *after patent*, upon an *express trust identical* with that upon which they were held by the *state before patent*. By her acceptance of the grant "subject to all the conditions of the act," and her consenting to execute the trust "pursuant in all things to the terms, limitations and conditions of the act," she of necessity consented that the trust should be continued upon the lands after patent to the company. It would seem, therefore, to be clear that she could no more exercise power of taxation over them after patent, the trust remaining unexecuted, than she could while she held the legal title herself. Any act of her's that would be inconsistent with the trust while she held them, would be equally inconsistent with the same trust upon which the company would hold them with her consent and under her agreement with the United States.

If the company had, when the two hundred sections were patented to it upon the completion of the first twenty miles, owed the state a debt, could the company have legally mortgaged the two hundred sections to the state to secure it? We think not.

If the state had obtained judgment against the company for the debt, could she have levied execution upon the lands

and sold them in satisfaction thereof? We think not. This would certainly have been a violation of the trust. If she could not take the *whole* in discharge of the debt, she certainly could not take a *part*. If she could not cause them to be sold on execution to satisfy a debt due her, we do not see how *she could sell* them to satisfy a debt due her for taxes. If the company had realized moneys from the sales of the land with which to proceed with the execution of the trust, it could certainly not, without violating the trust, have paid it or any portion of it to the state in discharge of a debt due the state which was in its inception foreign to the enterprise. To have paid the fund or any portion of it to the state for any purpose foreign to the "purposes aforesaid," would have been as completely a misapplication of it, as to have paid it to individuals or corporations for purposes unconnected with construction and equipment. If the company could not lawfully and without breach of trust have paid the fund or any portion of it to the state in satisfaction of such a debt as we have alluded to, the state certainly could not lawfully have *exacted* any portion of it. The state surely could not have taxed that fund. And why not? Because, as the avails of a trust estate it would be a trust fund, and sacred from diversion to any purpose. If the avails of the lands would be a trust fund dedicated and pledged by the state and the company by the terms of an express trust to the completion and equipment of the road, and therefore exempt from forced contribution, through taxation, to the general fund of the state, certainly the trust estate, before sale, would be equally exempt from such contribution. For the state to have subjected the first two hundred sections as soon as patented to the company and while unsold, to a tax charge for the support of the state, county, town and municipal governments, would have been plainly inconsistent with the due and fair execution of the trust, to the purpose of construction, etc., and *no other*. The requirement that the land should be disposed of for the

one purpose and no other, means that it shall be exclusively used for that purpose. Clearly it could not be *exclusively* used for the purposes specified, and in *part* for the general purposes of the state. We are well aware that ordinarily a trust estate or a trust fund required to be devoted to a specific purpose and *no other*, is not thereby exempt from taxation. But we submit that the case is different where *the taxing power is a party to the trust*, and *has agreed in the very contract that created it, that the trust property shall be devoted exclusively to a specific purpose from which taxation would in whole or in part divert it.*

True, it is said in the Tucker case, in approval of the case in 19 Iowa, heretofore cited, that "the imposition of taxes can in no just sense be said to be a diminution of the value of the lands." In a strict sense we must agree that this is so. But it *may*, nevertheless, *violate and utterly obliterate the trust.* If not, why would it be inconsistent for the state to tax the lands before patent, or what is the same thing, to devote a small portion of it to the payment of her general expenses? The tax is a *charge upon the land.* If unpaid, the *land* is sold. It is conveyed by the *state* and county to the purchaser, if any one bids, otherwise it is bid in by the county. If the *charge upon the land* is not paid, with interest, within the time limited for redemption, the *title* under conveyance from the *state* and county becomes absolute. The purchaser holds it freed from any trust. *The land itself is taken for the tax.* True its market *value* is undiminished, but its *value to the company for the purposes of the trust is not diminished only, but totally destroyed.* The state would thus have laid hold upon the trust estate, and by her own act, for the sole purpose of replenishing her own treasury, have passed it absolutely and forever into the hands of strangers to the trust, and utterly freed therefrom. In what technical sense, even, would the trust impressed upon the lands in the hands of the company have been executed? If the state, a party to the trust, could thus lay a charge upon the estate, enforcing it as a lien paramount to the very trust

itself, how easily might the trust be defeated. The state is the sole and arbitrary judge of the rate and extent of taxation. If, as soon as twenty miles of road was completed, and the two hundred sections of land patented to the company, the state could in this way subject them to taxation, and the company, with a little piece of nonpaying road, struggling to obtain from sales of the land the money with which to proceed with the fulfillment of the trust, could not pay the taxes, the whole would inevitably be swept away by this paramount lien of the state. Are we wrong in saying that such a doctrine is wholly at variance with every principle of the law of trusts, whether the trustee be sovereign or subject?

We assume, then, that when twenty miles of road was completed, and the two hundred sections of land patented to the company, the latter would have held them upon an express trust to which the state was a party, bound to dispose of them only for the construction and equipment of the remainder of the road, and that in such condition it would have been a violation of the trust for the state to have subjected them to taxation. This would, of course, be equally true as to the lands patented upon the construction of the succeeding sections of road until the whole was completed.

Now it was the exclusive province of the state to determine themethodin which the company should proceed with fulfillment of the trust. So far as the *legal right* was concerned, the state might have required the company as fast as it received a patent for lands, to open a land office and offer them for sale, applying the avails to the purpose of construction and equipment. Then as fast as lands were sold the trust, as to them, would have been executed and they would have been immediately taxable, and as fast as the trust funds so realized were applied to the purpose indicated, the trust as to them would have been executed. Or, the state, probably, might have required the lands to be sold at auction and the proceeds applied, with like legal effect. But

both methods were obviously inpracticable. As to the first, we know that in a new country private sales could not be effected with sufficient rapidity to enable the company to construct and equip the road with the avails within the few years limited by congress for the execution of the trust. As to the second, it was manifest that such a body of lands could not be sold at auction without a sacrifice so great as to render the avails entirely inadequate to the construction and equipment of the road.

So the state adopted a mode of procedure by which the money might be raised *upon the land, in advance of its acquirement by the company.* This could only be done by the issue of bonds, secured by mortgage or deed of trust upon the lands. The legislature authorized the company to exercise its own option as to the time when the bonds should become payable. It also authorized the company to prescribe the form of the mortgage or deed of trust. It will be remembered that the company was permitted to mortgage its property, real, personal and mixed, then owned and thereafter to be acquired, including the lands.

The company, in its mortgage, pledged the avails of the lands when earned and sold, to be paid directly to the trustees, in repayment of the money borrowed on the strength of the grant for the purpose of constructing and completing the road. This provision of the trust deed was simply a *declaration* by the *company* of the trust upon which it must of necessity hold the land when acquired. Simply *an agreement* between the *company* and its *bondholders* that it would execute the trust on which it held the lands, under the agreement between the state and the United States and the company and the state. It was an agreement that the company would hold the land when acquired through the expenditure of the money thus furnished in advance, *subject to the trust,* and would *dispose of its avails in strict accordance with the trust.* If the mortgage had contained no such provision, it would nevertheless have

been the duty of the company, in the execution of the trust, to have so applied the avails of the land, *and the duty of the state to see that it was done. In no other way could the trust have been executed.* Can it be claimed that the state, by thus enabling the company to obtain the money *in advance*, freed the lands from the trust when *patented to the company;* that when the money was raised in this manner, by mortgage in expectancy, and the company obtained patents, it was under no obligation, under the act of congress, with regard to the disposition it made of the avails of the land; that it could, without breach of trust, have applied the avails to purposes entirely foreign in every sense to the purpose for which they were granted?

It seems to us clear that by adopting this method, the state trustee of necessity *consented that the company should hold the lands impressed with the trust at least for the time the bonds were to run.* What peculiar right to tax could the trustee acquire by thus enabling the company to raise money on the lands in advance, for the earlier completion of the road? As fast as the lands are sold by the company, the trust is as to them, executed, and they would, therefore, be taxable. Could the state tax the proceeds of the land sold, before payment to the trustee? Clearly not. No more, it seems to us, can she tax the lands while unsold, the trust remaining unexecuted. Is a mere mortgage of the lands in expectancy a disposal of them for the purpose aforesaid? Suppose the company had immediately raised the money upon its bonds and mortgage, sufficient for the construction of the entire road, and had constructed the road and acquired patents within a year. If the state then subjected the lands to taxation, and for the nonpayment of the taxes they had been conveyed absolutely for the tax, we submit that in no just sense could it be said that the company or the state had *disposed of the land* for the "*purposes aforesaid.*" There would

have been no disposal of them by the company, but the state would have *disposed* of them, and *for her own purposes alone.*

If it be said that under this construction the company might, to the detriment of the public interest, hold the lands for a long time exempt, in order that they might enhance in value, we reply, that she had her choice to require them to be immediately sold and the avails applied in either of the ways we have indicated, or, if recognizing the fact that the better way was the one she adopted, the legislature might have limited the time during which the company might hold them impressed with this trust by limiting the time the bonds were to run. They are, as the record shows, fifteen year bonds, with but a few years yet to run. When they mature, and the lands which have not then been sold, are sold under foreclosure if the debt is not paid, the trust will be executed. We insist that parties furnishing the money to construct the road have a right to apply the *full avails to that purpose as far as they will go*, free from diversion by the state for purposes of her own.

Of course, the assertion by the state trustee of the power to tax the lands, implied from the enactment of an express exemption militates in no sense against the position we have taken, if the trust continued as we have argued, and the power to tax is inconsistent with the due and faithful execution of that trust.

## II.

*The laws subjecting these lands to taxation are invalid, as impairing the obligation of the contract entered into by the state and the plaintiff in error by the acts conferring the grants upon the latter, of which contract section* 10 *of article* VIII *of the constitution of Wisconsin forms a part.*

The constitution of the state, section 10 of article VIII is as follows:

"The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works, *but whenever grants of land or other property shall have been made to the state especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works*, AND SHALL DEVOTE THERETO THE AVAILS OF SUCH GRANTS, and may pledge or appropriate the revenues derived from such works in aid of their completion."

The language of this section seems very peremptory and very plain. As to it, construction would apparently have no office to perform. But it was the subject of judicial construction by the supreme court of the state in the case of *The State ex rel. Douglass v. Hastings*, 11 Wis., 448. Hastings, the state treasurer, had in his hands $1,335.00, set apart by the commissioners of school and university lands to the county of Outagamie as its proportion of the drainage fund income for the year 1860. There was at the time an unpaid balance of state taxes due the state by the county exceeding the amount of the county's proportion of the drainage fund, and the state treasurer claimed the right to withhold the latter as a set-off to such unpaid state taxes, or until the same should be paid.

Upon demurrer to the return of the state treasurer to an alternative writ of *mandamus*, the court say: "The act of congress of September 28, 1850, by virtue of which the swamp and overflowed lands were granted to the state, expressly provided, 'That the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively *as far as necessary*, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.'" The 10th section of article VIII of the constitution of this state, declares, "That whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular work of internal improvement, the state may carry on such particular works, and shall devote thereto

the avails of such grants, and may pledge or appropriate the revenue derived from such works in aid of their completion."

In the act of April 30, 1858, first above referred to, the legislature, acting within the line of its power and duty through the agency of the boards of supervisors of the several counties, directed the application of fifty per cent. of the net proceeds of the sales of such swamp and overflowed lands to the drainage and reclamation thereof. That act is a legislative declaration or recognition, that at least so much of such net proceeds are necessary to be appropriated to the purposes specified in the act of congress, and as long as it remains in force on our statute books, as it still does, we think it is conclusive of the evidence of such a necessity, and that by virtue of the language of the grant, and of the constitution, which we have quoted, it does not lie in the power of the state treasurer or the courts, at the same time, to divert such proceeds to other objects. This proposition seems "to us too plain to be made clearer by argument. The attempt of the state treasurer to retain the funds belonging to the county for these purposes, as an offset or payment of the amount due from the county to the state for state taxes, if sustained, would be an obvious diversion of them to other objects, and is therefore unouthorized by law."

It will be seen at a glance that the court holds that the grant by congress, requiring so much of the proceeds of said land, whether from sale or direct appropriation in kind, *as necessary* to be devoted exclusively to the reclamation of swamp land, with the act of the legislature adjudging *one half* of the proceeds to be necessary for that purpose, made that one half especially dedicated to that particular improvement, and that, under this constitutional provision, the state could not lawfully devote any portion of said proceeds to any other purpose whatever than to the particular improvement, not even to the payment of an amount due for state taxes. It follows, logically and inevitably, from the decision, that if the

act of congress had omitted the words "as far as necessary," and had required the lands or their proceeds to be devoted exclusively to drainage purposes and to no other purposes whatsoever, that the state could not lawfully have devoted any of the lands or their avails, through taxation, to the support of the government or to any purpose foreign to the particular improvement to which they were especially dedicated.

By the act of June 3, 1856, as well as that of May 5, 1864, the grant was not only *especially dedicated to a particular work of internal improvement*, but it was *exclusively* dedicated to that improvement.

The state might, under the constitutional provision quoted, have herself carried on the work. She might have done this through a board of public works, as she attempted to carry on the Fox and Wisconsin Improvement. If she had so done, it cannot be pretended but that the lands, until sold, or their avails when sold, would have been sacred from any contribution to the ordinary purposes of the state. Or she might have caused the land to be conveyed to trustees, with authority to raise money thereon by mortgage, or deed of trust to secure bonds payable in a given number of years. Had she done this, no one would contend that the lands while unsold, or the money realized from the mortgage bonds, could be taxed. But she wisely chose another course. She created the plaintiff in error, clothed with a corporate franchise to build the road. Upon this corporation she conferred the grant. In this the company was an agent of the state to execute the trust which she had accepted and undertaken.

When she created the corporation and conferred the grant upon it, and required it to file a resolution of acceptance, she agreed that if it would construct the road as required by the act of congress, it should have the aid of the land grant for the purpose. This constitutional provision formed a part of this contract with the company as completely as if the legislature had said: "The state of Wisconsin hereby agrees that

you may devote the entire avails of the lands when earned and sold, to the purposes of construction."

We repeat here what we said upon the other branch of the argument, that it was the sole province of the legislature to determine when the avails should be realized. It might, under the act of June 3, 1856, have sold one hundred and twenty sections of land in advance, and when the company acquired lands from time to time, it might have required them to be sold. But the legislature was unwilling to thus take the chances of a tardy construction of the work, and the probable forfeiture of the grant. So it chose to authorize the company to mortgage the lands in advance, and to pledge their avails when earned and sold, to replace the money thus obtained. In other words, it *authorized the company to do, as to the prospective avails, just what this constitutional provision required the state to do with the avails, had she executed the trust herself.*

By this act the state waived her right to have the lands immediately sold and their avails applied. She postponed the time within which the avails must be realized, either at forced or private sale, and consequently the time when she might subject the lands to taxation. In the completion of the work within the time allowed by congress, in the consequent increase of taxable values along the line of road, and in the revenue derived from the tax upon the gross earnings of the company, she receives her equivalent for the taxation which she was obliged to forego. We see no distinction between the "avails" of land and the "proceeds of land." It is obvious that no avails can be realized save through sale. When the company, under authority of the state, mortgaged the lands, it did not *sell* them, nor did it realize their avails. The *avails* of the lands might fall short by a million dollars of the *money borrowed* on the pledge of the avails. *This could not be if the money so borrowed was in any sense their avails.* If the state had conveyed them to trustees with authority to mortgage

them to secure the payment of bonds, as we have suggested, and it would not have been a sale of them, and a realization of their avails, so as to render them taxable, it is extremely difficult to see how just such a pledge, made by the railway company as the agent of the state, under authority of the state, could have any other or different effect. If they were swept away by tax deeds, against the will of the company, never having been *sold by the company*, the avails of the land, through the *only sale made of them*, would go to the state for the support of the state.

Would the avails of the lands have been in such case devoted to the particular work of internal improvement to which the grant was especially dedicated? It seems to us not. The fact that the railway company is to own the road or improvement when constructed certainly gives the state no greater right of taxation over the lands before they are sold than if they had been mortgaged by trustees representing the state. The distinction between the state's diverting the avails of the lands when sold by her, and seizing the lands to her own use before they have been sold, and thus precluding the possibility of the company ever realizing any avails for the purpose of the improvement is very shadowy, if, indeed, it exists at all. This provision constitutes an important part of the contract between the state and the company under which the work was undertaken. *Non constat* that the company would have undertaken it at all except under the constitutional guaranty that ultimately and in very substance the avails of the grant should be applied to the work. If the title to the lands before sale by the company, while the money borrowed for construction, upon the mortgage, was unpaid and the debt unmatured, was divested by a prior lien of the state for taxes, the road itself, which represents the money borrowed, would be liable for the whole.

The record shows (page 18), "that as soon as practicable after the plaintiff acquired title to the land granted by the said

act incorporating said company, and the acts supplementary thereto, the lands were put in the market; that said company has sold them since as rapidly as possible; that but a very small part of said lands have been sold; * * * that the avails of the lands already sold have been applied to the payment of said bonds, and that said avails were only adequate to the payment of said bonds to the amount of $100,000; that the whole grant called for by said act of congress was about one millions acres; that said grant was not a full grant; that there is a deficiency in said grant of $294,981\frac{88}{100}$ acres; that a large portion of the land to which said company had so acquired title, is sandy, barren and comparatively worthless; that it is uncertain what amount the avails of said lands will reach; that the strong probability is that they will be insufficient for the payment of said bonds."

We respectfully submit that upon the facts shown, to subject these lands to taxation and sale for the nonpayment of the tax, while they remain in the hands of the company, utterly unproductive of avails, with the bonds secured by them and by authority of the legislature still outstanding unmatured, is a violation of the contract between the state and the company, of which the constitution itself forms a part.

There is nothing in *Tucker v. Ferguson*, we think, which is counter to our position. In that case the whole question rested upon the language of the act of congress requiring the lands to be exclusively applied to the road, and to no other purpose.

Effect could be given to that language without involving any surrender by the state of the taxing power. The section might be construed to prevent the state from granting the lands to a corporation for another and different purpose than the road; as for the improvement of a harbor, or of the navigation of a river. But if the grant to Michigan had required the *avails* or *proceeds* of the lands to be exclusively devoted to the specific purpose indicated, we hardly think the decision would have been the same.

III.

But if the court shall be of the opinion that notwithstanding the language of section 8 of the act of congress of May 5, 1864, and section 10 of article 8 of the constitution of Wisconsin, and the mortgage made under legislative authority as we have shown, the lands when patented to the company became its absolute property freed from trust, and as such subject to taxation, then we confidently may rest the case upon *express legislative contracts of exemption.* This leads us to a review of the legislation upon the subject:

The first act of exemption was approved April 2, 1864, and entitled "an act to aid the Tomah and Lake St. Croix Railroad Company."

Omitting the superfluous words, section 1 is as follows: "All lands hereafter acquired by the Tomah and Lake St. Croix Railroad Company, and of which the title in fee * * may become vested in said company * * pursuant to the act of congress, entitled, etc., approved June 3, 1856, and the laws of the state of Wisconsin granting, etc., * * shall be exempt from taxation for ten years from and after the passage of this act."

The second section, after providing that in case any such lands should be sold, etc., the exemption should no longer apply to them, continues: "Provided that *said lands may be mortgaged for the purpose of raising funds to build such railroad, without being subject to taxation for the period before mentioned.*"

That the act became a valid, irrevocable contract when the proposition of the state was accepted by capitalists and money furnished upon the strength of it, we have no doubt. But we leave this proposition to be enforced and elaborated by other counsel in the case. For the purposes of the argument which we desire to to submit upon this branch of the case, it might be conceded to be a gratuity, subject to revocation at the will of the legislature.

It was insisted in the state court that the act of April 9, 1866 (Record, page 34), repealed this law of 1864. No notice whatever was taken of the act by the supreme court, and the proposition will perhaps not be repealed here, but lest it may be, we respectfully insist that the act cannot be considered as having any reference to the lands granted to the Tomah and Lake St. Croix Railroad Company, referred to by the act of April 2, 1864.

It contained no repealing clause, nor did it refer in terms to the act of April 2, or to the lands embraced therein. If a repeal, therefore, it must be by implication.

"It is only when the nature of the provisions of the two statutes to be construed, and the words used are such as to render it *impossible to reconcile* them, that the court will feel called upon to apply the doctrine of repeal by implication." *Taylor ex rel v. Brown*, 1 Wis., 513.

Both are affirmative statutes, the one *particular*, the other *general*.

"If the provisions of different chapters conflict with or contravene each other, and *one of them is general* and the other relates to a *particular subject, the latter shall govern as to that subject.*" *Mead v. Bugnall*, 15 Wis., 171.

The act of April 2, 1864, related exclusively to the Tomah and Lake St. Croix Railroad Company, and the lands it might acquire.

This act of 1866 relates *generally* to all lands granted by the acts of congress of June 3, 1356 and May 5, 1864.

"Whenever two statutes, apparently conflicting, are susceptible of a construction which will give operation to both, without doing violence to either, it is incumbent on the court to search for some allowable means to give them such a construction. *Taylor ex rel v. Brown, supra.*

The act of 1866 furnishes to our minds incontestable evidence, that the legislature did not intend it to apply, or

understand it as applying, to the lands of the Tomah and St. Croix Company.

1. It was an act to *extend* the time exempting certain lands from taxation."

"The title of the act aids the interpretation."

*Mundt v. Sheboygan, etc., R. R. Co.*, 31 Wis., 462.

Now, by the act of April 2, 1864, the lands of the Tomah and Lake St. Croix Railroad Company were exempted for ten years after the passage of the act, to wit, until *April* 2, 1874.

Manifestly the act of 1866, to *extend* the time exempting certain lands until *June* 3, 1871, could not have been understood as applying to lands already exempted by special act until *April* 2, 1874. Instead of an *extension*, it would be a material *reduction.*

2. The act recites that "the time limited by congress for the completion of the roads and carrying out the provisions of the grant having been extended to that date, viz., June 3, 1871."

As to the lands of the Tomah and Lake St. Croix Railroad Company, this recital was *untrue.*

By the act of Congress of May 5, 1864, the time for the completion of the road from Tomah to the Saint Croix Lake, and of the road from the Saint Croix Lake to Superior, was extended to *May* 5, 1869.

13 Stat. at Large, p. 67 (section 5).

By section 5 of the act of congress, approved March 3, 1865, the time for the completion of the road from Fond du Lac on Lake Winnebago, ect. (which was also a grant made by the act of June 3, 1856), was extended to the 3d *day of June*, 1871.

13 Stat. at Large, p. 522.

So that force and effect may be given to the act of 1866, and it still be held inapplicable to the lands of the Tomah & Lake St. Croix company.

It seems clear from the act itself that it was the intention of the legislature that it should apply only to the lands granted by the act of June 3, 1856, in aid of that road, the time for the

construction of which had been extended to June 3, 1871.

3. If the legislature had intended to make such a reduction in the time named in the act of April 2, 1864, they would surely have referred to that act in some way adapted to the expression of such intent, or at least would have incorporated the ordinary clause repealing conflicting statutes. It did neither.

It was also claimed in the court below that the power to mortgage contained in the act of April 2, 1864, was repealed by implication, because this act of 1866 was silent upon the subject, and that the words, "in any manner conveyed," found in the first proviso, rendered the lands liable to taxation whenever mortgaged.

We think the proposition hardly worthy of serious argument.

The legislature had just passed an act, amending the charter by striking therefrom the proviso in the 14th section which prohibited the company from encumbering the lands in advance for the purpose of raising funds with which to build the road.

The second section of the act of April 2, 1864, had clearly abrogated the proviso, and it was, in 1866, thus expressly repealed for the obvious purpose of removing any question which might possibly arise in the minds of capitalists as to the power of the company to mortgage the lands in expectancy.

This left the power given by the charter "to mortgage the whole or any part of its railroad, constructed or authorized to be constructed, and any or all of its estate, real, personal or mixed, in possession or expectancy, owned and acquired or to be thereafter owned and acquired," without any restriction whatever.

The fact that the legislature had thus amended the charter, a few days before the passage of the act of 1866, shows clearly that the words "in any manner conveyed" were not intended to include a conveyance by way of mortgage,—if the act is

to be construed as at all relating to the lands of the Tomah and Lake St. Croix Company. Otherwise the two acts would amount to this—that the company might mortgage its lands in expectancy for the purpose of raising money for the construction of the road, and that the *lands should become subject to taxation as soon as mortgaged*, which would be a strange way of *extending the exemption.*

Moreover, if the lands were to become taxable, as claimed, *when mortgaged*, then if the company exercised its clear authority to mortgage them in expectancy, they would, under the construction contended for, become taxable *before the company acquired title to an acre*, which is an absurdity.

If the act of 1866 applied to the lands of the plaintiff, which we insist it did not, and reduced the exemption given by the act of April 2, 1864, to June 3, 1871, then the exemption given by the act of 1870, to which we shall presently advert, would expire June 3, 1881, otherwise it would expire April 2, 1884. So we may fairly say that the act of 1866, in any event, bears legitimately only upon *the duration of the exemption.* We shall assume that it has no bearing whatever upon the case.

We now come to the act of March 16, 1870, entitled "An act to aid the West Wisconsin Railway Company."

Section 1 provides "that *the time in the act* entitled an act to aid the Tomah and Lake St. Croix Railroad Company, now the West Wisconsin Railway Company, approved April 2, 1864, and the acts supplementary thereto, in relation to taxing the lands granted by congress to aid in building the road of said company, *be further extended for ten years*, for that or any portion of said lands that shall remain unsold by said company." * * *

Section 2, after making it the duty of the officers of the company to furnish lists of lands sold, leased, etc., to taxing officers, that they might be assessed, concludes as follows: *and it is further provided*, AND THIS ACT IS UPON THE EXPRESS

CONDITION THAT IF THE SAID RAILWAY COMPANY SHALL NOT HAVE BUILT THEIR ROAD WITHIN TWO YEARS FROM THE PASSAGE OF THIS ACT, THEN, AND IN THAT CASE, THIS ACT SHALL BE NULL AND VOID." * * *

This was a distinct offer or proposition to the company, that if it would hasten the completion of its road, and complete it within two years from the passage of the act, the lands should remain exempt for ten years in addition to the unexpired time named in the act of April 2, 1864, and its supplementary acts.

The record shows that the offer was immediately accepted by the company; that it was published extensively in 1870 throughout the United States and Europe as an inducement to the purchase of its bonds; that immediately after its passage, "the company proceeded with the construction of its road, and did, during the year 1870, construct forty-five miles or more;" * that it did thereafter continuously proceed with diligence in the construction of said road pursuant to * * the act, and did complete the same during the month of November, 1871; that *during the year* 1870, *after the passage of said act, the said plaintiff, relying thereon, and on the strength thereof, incurred large liabilities and made large expenditures of money in hastening the construction and completion of said road, pursuant to the provisions of said act*, and continued so to do until said road was completed, relying upon the provisions of said act."

We respectfully insisted that the act, with the action of the company pursuant to it, constituted a contract binding on the state.

That the state may lawfully make such a contract is no longer an open question in this court.

In *Home of the Friendless v. Rouse*, 8 Wal., 438, the court say: "It is settled by the adjudications of this court, that a state may, by contract based on a consideration, exempt the property of an individual or corporation, either for a specific period or permanently."

The act does not fall within the class of laws denominated *privilegia favorabilia.* It is not, like the Michigan law, referred to in *Tucker v. Ferguson*, as to which this court, after holding it was not a contract, say: "There was no consideration. The *company was required to do nothing, and did nothing in return.* As between individuals, the stipulation would belong to the category of *nude pacts.* * * It was the promise of a gratuity, spontaneously made, which might be kept, changed or recalled at pleasure."

Here the company was *required to do something.* It was *required to perform the condition.*

Such a proposition when accepted, and liabilities incurred thereunder, would not be as between individuals a *nude pact.* It would possess every element of a binding contract. "When a state becomes a party to a contract, as in the case before us, the same rules of law are applicable to her as to private persons under like circumstances."

*Davis v. Gray*, 16 Wall., 232.

When the company complies with the condition the exemption cannot be said to be a gratuity, *for that is not a gratuity which must be earned or paid for.* The supreme court of the state seemed to think that an exemption from taxation could not, in the case of a corporation, possibly be anything but a *mere privilege.* They say: "For the continuance of the exemption was a *privilege* granted to the corporation at the option of the legislature." It was certainly at the *option* of the legislature to pass the act, and it was doubtless a *privilege* to the corporation to be permitted to *earn* the exemption by performing the condition. But what is a *privilege* at the outset may become *a right.*

The slightest consideration will support a promise and when the state says to the railway company "We give you this exemption upon the *express condition* that you complete the road within two years from the passage of this act," and holds out the promise upon the condition until the company

has literally performed, she cannot, admitting the promise and the performance by the company, be heard to say in avoidance of the contract, that the performance of the condition was of no benefit. The legislature manifestly supposed the performance of the condition was of benefit to the state when the act was passed, and so left it until after it was performed.

The act in form is very like the resolution of congress *extending* the time to this company for the construction of its road, *upon condition* that if the road was not built from Tomah to Black River Falls within a year, the act should be null and void. We suppose no lawyer would contend that after the company had accepted the act, and expended money in performing the condition, congress could, before the year expired have revoked the extension.

15 Stat. at Large, p. 257.

Another thing is worthy of remark in this connection. The act of 1870 made the completion of the road by the 20th of March, 1872, a condition of the exemption. At the time the act was passed there was no time limited by the state for the construction of the road. The time limited in the charter had been by act of April 6, 1866, stricken out.

Record, page 34.

By the resolution of congress of 1868, referred to in the statement of facts, the time had been extended to May 5, 1872. This limited the time, not within which the road should be constructed, for this congress could not limit, but the time within which the remainder of the lands might be earned by the construction of road. The act of 1870, therefore, not only required the company to construct the road within a given time in order to obtain the exemption, but within a *shorter* time than congress had given for acquiring the lands. Certainly this was a consideration. It will be borne in mind that the act of 1870 did not require the company absolutely, and independent of the exemption, to construct the road on or before

March 20, 1872. If the company had failed to construct the road before March 20, 1872, it would have been no violation, in any sense, of this act of 1870. *The requirement to construct the road by the date indicated was simply a condition of having the exemption.* The fact that the time thus gained to the state under the grant was small does not affect the consideration.

We insist that after the offer contained in the act of 1870 was accepted, after the company had incurred liabilities and made large expenditures of money in *hastening the construction of the road under the provisions of the act*, it was beyond the power of the state to revoke the offer and prevent the company from proceeding with its performance of the conditions — the corporate franchises remaining meanwhile untouched.

Very much such a contract was involved in the case of *Montgomery v. Kasson*, 16 Cal., 189.

The state of California was desirous of reclaiming certain swamp and overflowed lands, and, for that purpose, the legislature passed an act granting the right and privilege of reclamation to certain parties, their associates and assigns, and authorized them, for the purpose to construct certain canals, requiring them to commence one of the canals within a year, and to finish and put in operation all of them within five years. Section 3 of the act was as follows: "In consideration of the reclamation of the said swamp and overflowed lands, and for the opening and completion of said canals, the one-half of said lands is hereby granted and conveyed to the persons named in the first section of this act, and their associates and assigns, upon the condition that the said grantees shall reclaim the same within five years," etc. * * *

The grantees entered upon the performance of the condition, employed an engineer, surveyed the proposed canals and commenced excavations.

The legislature then repealed the section. Mr. Justice Field, then chief justice of that court, delivered the opinion of

the court, and after holding that the grant was upon condition precedent, says: "The third section therefore does not operate to pass any present estate to the grantees. It passes no estate until the performce of the condition annexed, that is, until reclamation of the lands. The grant is not, however, any the less a contract between the state on the one part and the grantees on the other. It is a contract by which the state grants certain land upon condition of work to be performed, the grant to take effect when the work is done. It is a contract by which valuable rights may be acquired absolutely, upon the performance of the acts specified as consideration moving to the state * * * They brought themselves within the terms of the first section, providing for the "commencement of the canals or some one of them " within one year after the passage of the act. For the completion of the reclamation they have five years, and if within this period it be effected, the title to the alternate sections designated will vest in them absolutely. By the *work already performed the right to proceed* with the reclamation, and when this is accomplished, to take one-half of the lands, has become fixed. With this contract and the rights of the grantees thereunder, acquired by the part performance of the consideration the legislature cannot interfere. They are under the protection of both the federal and the state constitutions." The repealing act was therefore held void.

Now an exemption from taxation may be as much the subject of grant by contract, as may lands. It may be, when acquired, a property right of the greatest value. And it is difficult to perceive why a grant of exemption, upon condition that a certain thing, supposed to be of benefit to the state, be done within a given time, is not as much a contract as that referred to in the case just quoted. And it is quite as difficult to perceive why an acceptance of the offer, and the expenditure of money, and the incurring of liabilities in strict performance of the condition, do not in such case, as in the

other, give the grantee a right to *proceed* with its full performance. Why may we not in this case, as in that, say in the language of Chief Justice Field: "With the contract and the rights of the grantees thereunder, *acquired by the part performance of the consideration*, the legislature cannot interfere?"

The corporation was permitted to exist and to perform the condition fully.

If under the constitution of Wisconsin, it is *possible* for the legislature to enter into a contract with a corporation, the obligation of which will be protected from impairment, this is certainly such an one.

## V.

*Was the contract of exemption revocable by virtue of what is known as the "Reserved Power" contained in the constitution of Wisconsin?*

The supreme court of the state held, that though a contract, section 1 of article XI of the state constitution entered into and formed a part of it, and that it was therefore revocable.

The constitutional provision is as follows: "Corporations without banking powers or privileges, may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. *All general laws or special acts enacted under the provisons of this section may be altered or repealed by the legislature at any time after their passage.*"

We insist, first, upon this branch of the case, that the act of 1870, making the offer of the exemption, was in no sense a part of the charter, and that, therefore, this reserved power has no bearing whatever upon it. It did not profess to be an amendment of the charter. It did not alter in any respect any of the corporate franchises given by the charter, and we are unable to see upon what theory it can be said to be a "general

law or special act enacted under the provisions of section 1 of article XI." But admitting for the purpose of the argument that it is otherwise, we still insist that the contract could not be revoked.

Under this constitutional provision it must be conceded that an act of incorporation is not and cannot be an irrevocable contract. It may be altered or repealed at any time by the legislature. The legislature might, doubtless, under this provision, have put an end to the contract of exemption a year after its passage by repealing the charter, thereby destroying the corporation, and withdrawing its franchise and rendering it impossible for it to fully perform the condition. Had it chosen to do so, we suppose that so far as the company had performed the condition, and acquired lands through such performance, those lands would have been exempt. For the company not being in fault, it would have been disabled by the act of the state from a full performance, and the state certainly could not in such case deprive the company of the exemption as far as earned, upon the ground that it had not *fully performed.*

Davis v. Gray, *supra.*

But the charter has not been repealed, nor have any of the corporate franchises been altered or repealed by amendment. While we must therefore concede that the legislature may revoke the corporate franchises at any time, and at pleasure annul the corporate existence, still we insist that the legislature may make contracts with such corporations, *even in the act of incorporation*, which are protected by the constitution of the United States.

It is unnecessary for us to attempt any discussion as to the scope of this power. That it has a limit is, we believe, universally conceded.

*The limit indicated by this court is entirely sufficient for the purposes of the case.*

In the case of *Miller v. The State*, 15 Wal., 498, the court say:

"Power to legislate founded upon such a reservation in the charter is certainly *not without limit, and* it may well be admitted that it cannot be exercised to *take away or destroy rights acquired* by virtue of such a charter, and which by a legitimate use of the powers granted, have become vested in the corporation."

In the case of *Holyoke Company v. Lyman*, 15 Wal., 522, the court say: "Power to legislate upon such a reservation is certainly not without limit, but it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it, that will not defeat or substantially impair the object of the grant or *any rights which have vested under it.*" * *

Here the distinction is plainly taken between the *corporate franchises* and the *property* and *rights* acquired in the *legitimate use* of those franchises, between what the legislature *gave* and what the corporation has *acquired.*

The corporate franchises were permitted to exist until the company acquired, in their legitimate exercise, the lands. The Supreme Court of Wisconsin admit, though with apparent reluctance, in the case at bar, that under this reservation the title to the lands could not be divested.

It is equally true that the company was permitted, in the legitimate exercise of its franchises, to perform the condition upon which, under the act of 1870, it was to have the exemption. Is not the *right to the exemption* as fully earned as the *right to the land?* It is a right which may be *earned*, and, when earned, is it not as sacred and as completely vested as any other? The company did not obtain it, as it did its corporate franchises, complete and perfect from the state, requiring only *acceptance.* As to the lands, all that the state *gave* was the *right to acquire* them by constructing the road. So, as to this exemption, all that the legislature *gave* was the right to *acquire* it or *earn* it, by constructing the road within a specific time, *shorter* than it was otherwise required by any law to

construct it. It could obtain the exemption, as the lands, *only* by *earning it.* It received the one *directly* from the state no more than it did the other. Is the contract, in the one case any less an executed one than in the other? Certainly not. The one is *paid for* as much as the other.

The *lands* was the *price* paid by the state to the company for *constructing the road.* The *exemption* was the *price* paid for constructing *it within a given time.* By constructing the road *within the time* the company not only acquired the lands, but it acquired the *right* to hold them with the *added value* imparted by the exemption. This was the "stipulated character of the land." Is not the exemption, when earned, essentially a *property right?* The case of *McGee v. Mathis,* 4 Wal., 143, is in point.

The state of Arkansas had passed an act providing for the issue of transferable scrip receivable for swamp lands, and also enacted that the swamp lands should be exempt from taxation for ten years. McGee was the holder of scrip, when the legislature of Arkansas repealed the exemption.

This court in discussing the validity of the repealing act, say:

"The contract of the state was to convey the land for the scrip, and to refrain from taxation for the time specified. Every piece of scrip was a contract between the state and the original holder and his assigns. Now what was the effect of that contract when made? Did it not bind the state to receive the scrip in payment for swamp land exempted for a limited time from taxation? The scrip, if not receivable for land, was worthless. To annul the quality of receivability was to annul the contract. *But the exemption of the land* for which it was receivable, from taxation, was a *principal element in its value,* and *repeal of the exemption was the destruction of this element of value.* This was clearly an impairment of the contract. The state could no more change the terms of the contract by changing the *stipulated character of the land* to be conveyed in satisfaction of the scrip as to liability to taxation, than it

could abrogate the contract altogether, by refusing to receive the scrip at all in payment for land."

We are unable to see why the exemption in the case at bar stands upon any different footing than in the case just cited. It *entered into* and gave *added value to the land*, and we fail to see upon what theory the legislature could any more destroy this *element of value*, when earned, could any more change this *stipulated character* of the land, than it could take part of the *land itself*.

Our position is not inconsistent with any adjudication of this court.

The supreme court of the state rested its decision upon the case of *Tomlinson v. Jessup*, 15 Wal., 454. That case we think, with all deference to the state court, is in no sense like the case at bar, and furnishes no support to the conclusion arrived at.

The exemption in the *Jessup* case was by amendment to the charter, and clearly a part of the charter. It applied to the property of the company then owned and thereafter acquired. It was a mere gratuity. Like the Michigan act in *Tucker v. Ferguson*, it required the company to *do nothing* in order to obtain it. It of itself possessed no element of a contract. As between individuals, it would have been a *nude pact*. It was in character, precisely like the exemption in *Rector, etc. of Christ Church, Phila., v. County of Phila.*, 24 How., 300.

Outside of the act of incorporation it would have been a mere privilege, existing *bene placitum*, and subject to revocation at the will of the sovereign. Had no power to alter or repeal the charter been reserved it would have been irrevocable only by virtue of *being in the act of incorporation which itself would be an irrevocable contract.* The power to alter or repeal being reserved it could be repealed because *a part* of the act of incorporation which, itself, was repealable.

There is nothing in the opinion which shows or tends to show that if the legislature of that state had by act provided

that the railroad company should have the exemption *upon condition* that within a year *it completed and put in operation its entire road, or a branch road*, the state could under the reserved power, *after a full performance by the company*, have revoked the exemption.

The state court say in their opinion:

"In the case of *Home of the Friendless v. Rouse*, the legitimate and necessary inference to be drawn from the opinion of the court is, that the legislature might have *resumed* the power of taxation which it had relinquished if it had reserved the right to do so in the grant itself to the corporation, or by making the general law upon the subject apply to it."

We certainly agree that such is the legitimate and necessary inference to be drawn from the opinion in that case, and we have no doubt that such is the law. But we do not see in what sense that has any bearing on the question involved in the case at bar. In that case, as in the Tomlinson case, the exemption, but for the fact that it was a *part of the act of incorporation*, was a mere gratuity. Its character as a contract rested simply and solely upon the same foundation as did the charter. It was a contract only because it was a part of the charter which was a contract. It was irrevocable only because the charter was an irrevocable contract. Had the power been reserved to alter or repeal the charter, the whole or any part of it might have been revoked, including the exemption. Not being reserved, the case fell within the rule of Woodward v. Dartmouth College.

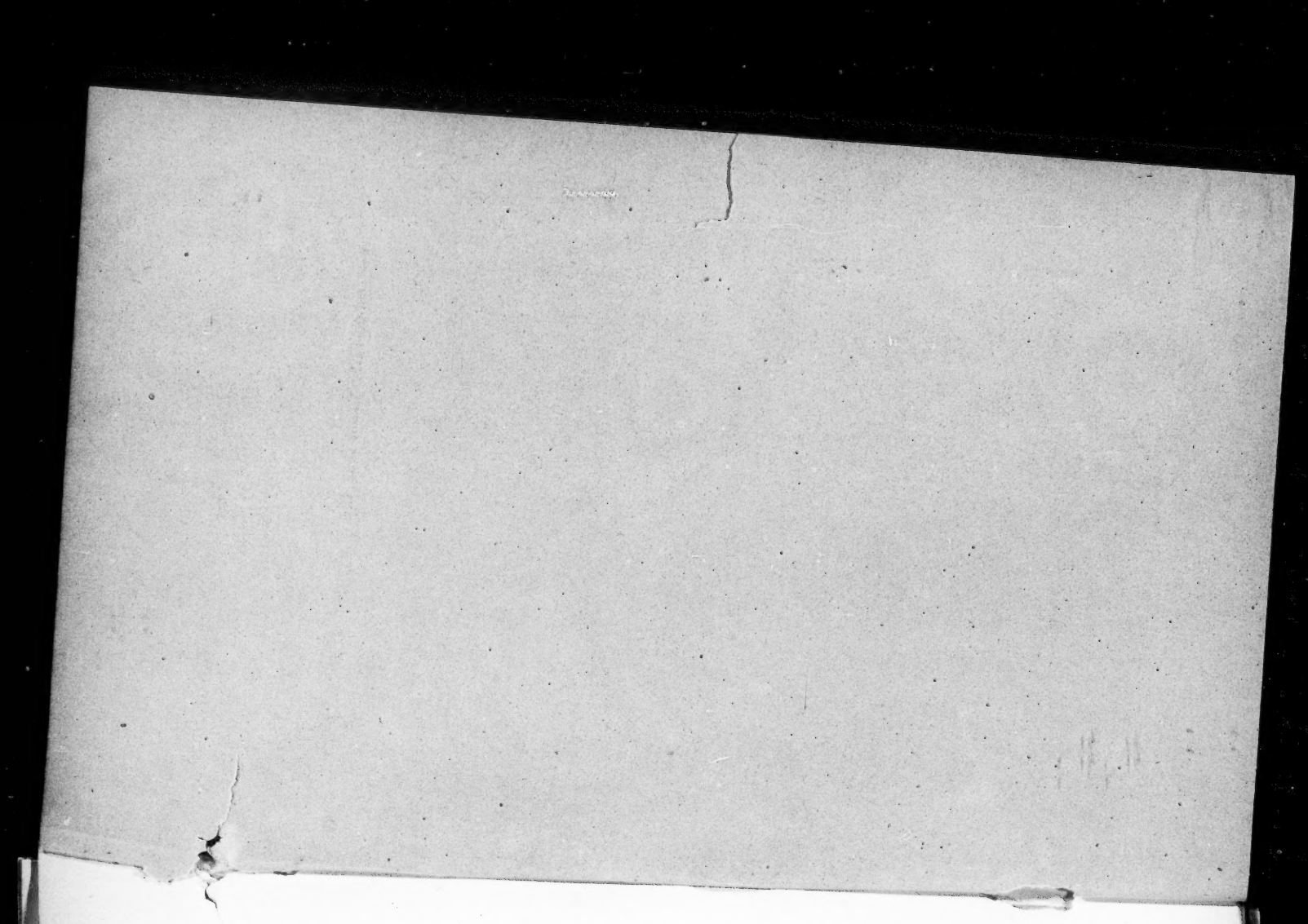
Again, the state court say: "Suppose the provision exempting the lands from taxation for ten years on condition that the company should complete its road within two years, had been in its charter; would this render the charter any more sacred or inviolable, or place it beyond the reserved power contained in the constitution? We think not."

We also think not. But the question is, whether if the charter is permitted to remain untouched by the legislature,

and the company proceeds in the exercise of its franchise and charter powers to perform the condition, a repeal of the charter would operate to take away the exemption thus earned, the *right* thus acquired by the performance of the condition? We think not.

We respectfully insist that the judgment of the supreme court of Wisconsin in this case was erroneous and should be reversed.

JOHN C. SPOONER,
*Of Counsel for Plaintiff in Error.*



# SUPREME COURT

## OF THE

# UNITED STATES

WEST WISCONSIN RAILWAY COMPANY
PLAINTIFF IN ERROR

*vs.*

THE BOARD OF SUPERVISORS OF THE COUNTY OF TREMPEALEAU, DEFENDANT IN ERROR.

**Brief of Defendant In Error.**

# SUPREME COURT
## OF THE
# UNITED STATES

WEST WISCONSIN RAILWAY COMPANY
PLAINTIFF IN ERROR

*vs.*

THE BOARD OF SUPERVISORS OF THE COUNTY OF TREMPEALEAU, DEFENDANT IN ERROR.

## Brief of Defendant In Error.

The federal question presented by the record in the action, arises under Article 1, Section 10 of the Constitution of the United States. By the Laws of Wisconsin, all the unsold lands of the plaintiff in error were exempt from taxation for a term of years. By Chapter 386 of the Private and Local Laws of Wisconsin, enacted in 1871, that exemption was entirely taken away, so far as it applied to lands of plaintiff in error lying in Trempealeau County. It is claimed by the plaintiff in error that it was incompetent for the legis-

tors of Wisconsin to take away this exemption, because the exemption was in the nature of a contract between the State of Wisconsin and the plaintiff in error; and that the act which takes away the exemption is a law impairing the obligation of the contract within the meaning and prohibition of the provision of the Constitution of the United States.

Doubtless the charter of the company, when accepted by the corporation, constituted a contract between them and the State. One of the rights or franchises conferred upon the company by its charter, was the right to earn and acquire title to the lands granted by Congress, to aid in building its road. The legislature afterwards added to this original franchise, this further incident, that the lands earned under its charter should be exempt from taxation for a limited time ; and this right to have such lands exempt from taxation became a part of the contract between the company and the State. These acts giving exemption from taxation are to be considered, as in effect they are, amendments to the company's charter—as new incidents of the original franchise; and are not of a higher or more sacred character than the original charter itself. Miller vs. People of New York, 15, Wallace R. 478

The constitution of Wisconsin, Article 11, Section 6, expressly reserves to the legislature the power to alter or repeal all general laws or special acts, under which corporations, without banking powers, are created, at any time after their passage. This provision, in effect, preserves to the legislature the right to annul and revoke

all corporate franchises and privileges which it might grant. As said by this court in Tomlinson vs Jessup, 15 Wallace, P. 454, "the reservation effects the entire relation between the State and the corporation, and places under legislative control, all rights, privileges and immunities, derived from its charter directly from the State" The right to repeal or alter the franchises given, is a right reserved in the contract itself, and its exercise by the legislatnre, instead of impairing the obligation of the contract, is the exercise of a right given by, or reserved in the contract itself, "With the grant for exemption from taxation, was annexed the reservation that such grant might be altered or revoked by the legislature at any time after its passage"

The question presented by the record is fully and ably presented by the opinion of the Supreme Court of Wisconsin, in the case, on page 13 of the printed case It has also been exhaustively argued before this Court, by eminent lawyers, in what are known as the "Granger Cases" from Wisconsin.

For these reasons we submit the case to this court, upon a statement simply of the question and principles presented by the record.

A. W. NEWMAN,
Attorney for Defendant in error.

W. P. BARTLETT,
Of Counsel.

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1876.

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THE WEST WISCONSIN RAILWAY COMPANY,
Plaintiffs in Error,
*vs.*
THE BOARD OF SUPERVISORS OF THE COUNTY OF TREMPELEAN,
Defendant in Error.
} N. 52.

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## I.

1. As to the claim that the taxation complained of was unauthorized, because in alleged violation of the trusts created by the acts of Congress and the acts of the legislature accepting them, and undertaking the trusts thereby created, (pages 12 and 11 of the respective briefs,) it is important to bear in mind that this case in this respect is like *Tucker* vs. *Ferguson*, 22 Wall, 527, and the claim of the plaintiff in error is disposed of by it, unless it can be maintained, as claimed by its counsel, that the act of Congress, May 5, 1864, (13 Stat. at Large, 66,) is a revision and amendment of the grant of June 3, 1856, (11 Stat. at Large, 20,) and controlled the administration and disposition by the State as trustee of all the lands granted, as well those by the act of 1856 as those granted by the act of 1864, increasing and enlarging the grant.

Evidently this must be so, as all the lands mentioned in the complaint came to the State by the act of 1856, and under its provisions were conveyed to the company in like manner as in *Tucker* vs. *Ferguson, supra;* and it seems to be conceded that the State had, as to these lands, fully executed the trust, unless the provisions of the act of May 5, 1864, apply to them as indicated. Argument, 13–16.

2. But if it be conceded that the claim of counsel as to the applicability of the several provisions of the act of May 5, 1864, to the disposition of the lands in question, granted in 1856, and the administration of the trust on the part of the State is correct, it is still submitted that the State had discharged its entire duty in the premises and executed its trust when it conveyed them unconditionally to the railway company.

And if the lands came to the company charged by the terms of the act of Cougress of May, 1864, with a trust requiring *it* to dispose of the lands *for the purpose of completing the road and no other purpose*, the state was not bound to see to the due execution of that trust.

Whatever trust there was or is in this respect, and whether it has been violated or not, is a matter between the railway company and the United States.

No duty was devolved on the State in this behalf, and as to these lands it has fully executed the trust. The trust it accepted and agreed to perform terminated with the conveyance of the lands, according to the terms of the act. It neither accepted nor did it stipulate to perform any other.

3. The title having vested in the company subject to the execution by it of a trust which the United States had impressed upon the lands, no exemption of them from taxation can be implied. The State did not occupy any position in respect to them which would suspend its ordinary powers of taxation.—*Tucker* vs. *Ferguson, supra.*

The State agreed to execute the trust imposed on it. This it has done. It did not agree or undertake that the company would observe the trust duty imposed on it, after it obtained title to the lands. It did not become in any sense a party to that undertaking.

But if it was required to see that the *avails* of the lands, after they had been conveyed to the company, were applied to the designated purpose, it is submitted that this consideration would not operate to restrain it from taxing the *lands* after they had become the property of the company. A surrender of the power of taxation cannot be implied from it.

The act of 1864 contemplates that the title shall vest in the company when and as fast as the road is built, instead of being sold by the State, the company being obliged to see to the application of the fund realized; and it contemplates that the trust and duty of the State in that behalf shall cease with the conveyance, and the duty of the company to whom Congress is to look then begins.

If the company is the mere agent of the State to execute the trust for it, then the company has no right to complain, as the question would be one solely between the State and the United States, and the United States has not as yet complained of any violation of the trust.

The language of the act of Congress is that the land shall "be *subject to the disposal of the companies* respectively entitled thereto *for the purpose aforesaid and no other*." This is entirely consistent with the right of the State to tax the lands. They are subject to the disposal of a private corporation, and have become its property absolutely, subject only to a requirement that *it* shall dispose of them for a definite purpose.

But the State performed the full measure of its duty both under the acts of Congress and under the provision of its Constitution, relied on by the plaintiff in error.

Under either act a conveyance of the lands to the company upon completing successive sections of twenty miles each of its road, is all the application of the lands or their avails required of the State by the acts of Congress or State constitution.—*Tucker* vs. *Ferguson*, supra.

II.

1. The remaining question is whether the railway company acquired any contract rights under the legislation exempting its lands from taxation which might not be lawfully repealed and taken away by the legislation complained of. We say whether the *company* acquired any such rights, because it is the sole complainant before the court. Neither the trustee nor any of the bondholders or stockholders are before the court. *Jessup* vs. *Tomlinson*, 15 Wall, 54, was a bill by a stockholder, and *Tucker* vs. *Ferguson*, 22 Wall, 527, was a bill by the trustee for the bondholders. They may choose to forego the assertion of any rights they may have in the premises. The railway company cannot be allowed vicariously to assert their rights or bring forward their grievances. If aggrieved they may no doubt bring an appropriate suit for relief, and if any doubt existed of their right under general principles of equity jurisprudence to do so, it has been removed by express statute. 1 Tay. Wis. Stat., 463, § 256, which provides that—

"Any person or persons who are the holder or holders of any lien or encumbrance upon any real estate, or who are or may be authorized by the act of which this is amendatory, or otherwise by law to acquire a further lien or charge upon real estate by the payment of any taxes, interest, or charges thereon, or by the redemption thereof when the same shall have been sold for taxes, shall also have the same right of action that the owner of the land in fee has to test the legality and validity of any such tax, charge,

assessment or tax sale, and to annul such tax, charge, assessment or tax sale, and to enjoin the sale or deeding of any land on account thereof."

What rights or remedies the mortgagees or bondholders may have, it would seem quite immaterial to consider. They are not before the court in any form or for any purpose.

The fifth assignments of error and the argument under it need not therefore be further considered, if the railway company has no constitutional right to complain of or impeach the legislation in question.

Whether it can maintain that the repealing acts are void as impairing the obligation of their contract between it and the state is the important question.

2. And the question arises whether there was any valid grant of exemption or contract of exemption of these lands from taxation.

Without stopping to discuss the question whether a State legislature in the absence of constitutional restrictions can cede or grant away the power of taxation as to any particular class of persons or kind of property, for a limited time, or to corporations in perpetuity, a question settled in this court after much controversy and dissent, but not conceded by the Wisconsin courts, yet we submit that the Wisconsin legislature by the constitution of the State was prohibited from making any contract, such as is relied on in this case. The Constitution provides Art. 8, Sec. 10, that "*The State shall never contract any debt for works of internal improvements, or be a party in carrying on such works*, but whenever grants of land or other property shall have been made to the State especially dedicated by the grant to particular works of internal improvement, the State may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate *the revenues derived from such works* in aid of their completion."

All civilized governments depend upon taxation for their existence. Taxation in one form or another is the spring of all their resources. If the State could surrender or devote any considerable portion of such resources for such purposes, then it might surrender or cede away all of them. By so doing, it becomes in the most direct manner a party to carrying on such works, as much so as if it contracted debts for these purposes, which it could only pay by the exercise of the power of taxation.

A profound conviction of the ruinous policy of such uses being made of the public resources dictated the adoption of this provision of the State constitution, and when the power of the State legislature was limited by it to pledging and appropriating the revenues derived from works, built by grants to the State, to aid in their completion, the right of the legislature to cede away the taxing power or its proceeds for the same purpose was, we submit, impliedly forbidden. Attention is called by counsel of the plaintiff in error, to the fact that the act relied on as an exemption from taxation is entitled "an act to aid the West Wisconsin Railway Company," a company chartered to build and operate a certain railway, and contends that the title aids the interpretation where interpretation becomes necessary.

As well might it be insisted that an act appropriating $100,000 out of the general fund to aid the same company in building its road would be a valid act as to contend that the power which puts money in the Treasury may be ceded away, to the same extent or for the same purpose. The result is the same in either case, and either method of aiding the company is impliedly forbidden by the State constitution.

3. But against such legislation there is an unequivocal constitutional inhibition found in Sec. 1 of Art. 8 of the state constitution which declares "that the rule of

taxation shall be uniform, and that taxes shall be levied upon such property as the legislature shall prescribe."

Under this provision there is no doubt of the power of the legislature to discriminate as to the *kinds* of property to be taxed, but not as between different *owners* of any particular kind. When the taxing power is applied to any particular *kind* of property, as to sheep, horses or real estate, then *all* persons owning property of that kind must be taxed alike i. e. by a uniform rule.

*Knowlton vs. Supervisors*, 9 Wis. 410.
*Att'y General vs. Plank Road Co.*, 11 Wis. 35.
*Durkee vs. Janesville*, 28 Wis. 464.

An exception has obtained to this rule on account of an early judicial decision as to property occupied and actually used for railroad purposes. *Kneeland vs. Milwaukee*, 15 Wis. 454.

Hence it cannot be maintained that either of the alleged contracts possess any validity. Forbidden by the state constitution they are void and and their repeal cannot be made the subject of complaint by anyone.

4. But assuming that the acts of exemption relied on are valid, it is then confidently submitted that they conferred on the railway company, a mere franchise or special privilege not belonging of common right to citizens generally; that they were in effect and substance amendments of its charter, and so repealable under what is known as the Reserved Power under the provision of the constitution involved in the "Granger Cases," Art. 11, Sec. 1, Const. of Wis.

"Franchise" is a word of extensive signification, and is defined to be a royal prerogative in the hands of a subject." Finch, 164.

If in England a privilege in the hands of a subject which the King alone can grant, would be a franchise; with us a privilege or immunity of a public nature,

which cannot be legally exercised without legislative grant would be a franchise. Angell & Ames on Cross § 737; *People vs. Utica Ins. Co.* 15 Johns 387, "Franchises are special privileges conferred by government on individuals, and which do not belong to the citizens of the country generally of common right," TANEY, CH. J. in *Bank of Augusta vs. Earle* 13 Peters 595.

Such a franchise as the exemption in question is upheld as being made upon considerations moving to the State. 8 Wall 437

The right to acquire the land-grant of 1856 in question, and to sell it is a franchise—a corporate franchise, *Davis vs. Gray*, 16 Wall 228. The exemptions relied on were so much of benefit added to the original franchise by way of enlargement and amendment, making the right to acquire this property much more valuable, and this right or franchise is a thing separate and distinct from the land. It was an incident of the ownership actual or contemplated of the railway company. It was not transferable, nor was it property or a property right in any other sense than the corporate franchises, faculties and powers of a corporation are property.

Had these franchises been incorporated in substance in its charter there would have been no doubt but that they were repealable under the reserved power contained in Sec. 1, Art. 11, of the constitution of Wisconsin. To deny that they are repealable while their substance remains the same as if incorporated in the charter, simply because they have assumed a different *form*—the form of separate acts, not in so many words professing to be amendatory of the original charter, although they are such in substance, would be an evasion of the constitutional provision, and render it practically of no benefit. It would be a mere sacrifice of substance to form, and open the door to numberless evasions of the policy its salutary provisions were designed to enforce.

That the acts conferring the exemption relied on are in substance, amendments of the charter of the railway company, seems quite clear, though they are not entitled as such in so many words.

Upon this point, it is submitted that the *substance* of the acts and their relation to the rights conferred and duties imposed by the original charter must control.

Although corporations, in their eager grasp for power and special privileges, may, by cunning devices and a crafty use of language, give the transaction the color and semblance of a contract, for a new consideration; yet the essential character of the privilege granted remains the same, and it will still continue subject to the operation of the reserved power. 15 Wall 497

No matter how extensive or valuable the consideration paid, the legislature cannot barter away the sovereignty of the people over corporations of their creation reserved by the fundamental law. No such power has been delegated. It has been plainly and expressly withheld.

The claim of the railway company is that they have bought this franchise and paid for it, and that it is irrepealable.

To this we answer that the legislature *had no power* to grant a franchise or privilege to a corporation and make it irrepealable.

"In the case of a corporation the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made as in the present case by an amendment of the charter it is supported upon the consideration of *the greater efficiency* with which the corporation will be enabled to discharge the duties *originally* assumed by the corporation to the public or the greater facility with which it will support its liabilities and carry out the purposes of its creation."—*Tomlinson vs. Jessup*, 15 Wall, 458, 459.

The amount or extent of the consideration is not a material consideration, as one of the most trifling and insignificant character will suffice to support and give effect to the obligations of the most onerous character.

Cooley on Taxation 55 & 56 note 1

It was not necessary to state in the act that the exemption should be subject to repeal. The Constitution, the paramount law of the land, under and subject to which the legislature acted, went with it as a part of the law, and supplemented it with the reserved power by which it was made repealable at the will of the legislature.

And the rights of the bondholders and mortgagees which the company seeks vicariously to bring before the court, are subject to the same condition. They "took their interests with knowledge of the existence of this power and of the possibility of its exercise if the public interest should at any time require such interference. It is a provision *intended to preserve to the State control over its contract* with the corporators, which, without that provision, would be irrepealable, and protected from any measures affecting its obligation."—*Tomlinson* vs. *Jessup*, 15 Wall, 458. * * * "The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."—Id., 459.

Upon this subject the case of *Tomlinson* vs. *Jessup*, 15 Wall, 468, is clear and decisive, and is confidently relied on.

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Adopting the same views of this transaction, the Supreme Court of Wisconsin considered the repealing acts a valid exercise of legislative power reserved by the constitution of the State, (*West Wisconsin Railway Co.* vs. *Supervisors, &c.,*) and it is confidently submitted that this judgment of the State court should be affirmed.

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